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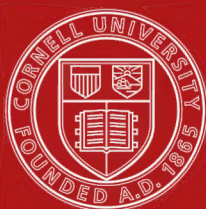
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The law of insurance, as applied to fire



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THE LAW OF INSURANCE.

VOLUME II.

THE
LAW OF INSURANCE,

AS APPLIED TO
FIRE, LIFE, ACCIDENT, GUARANTEE
AND
OTHER NON-MARITIME RISKS.

BY
JOHN WILDER MAY.

THIRD EDITION,
REVISED, ANALYZED, AND GREATLY ENLARGED.

BY FRANK PARSONS.

IN TWO VOLUMES.

VOL. II.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1891.

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§ 340. Payment of the premium ; Option of Insured. — The premium paid is the consideration received by the insurers for the risk which they undertake. Ordinarily, therefore, and

in the absence of special stipulation to the contrary, the delivery of the policy and consequent assumption of the risk, and the payment of the premium, are coincident. They are two acts on the part of the respective parties which perfect the contract and give it validity. The recital in the policy is, that the insured having paid the premium, and complied with certain other conditions, the insurers are under certain obligations to him. But it is also almost universally provided that the policy shall not take effect until the premium be paid. And in such case, until the payment of the premium, the contract will not take effect, although all the terms may have been agreed upon, and the policy made out, if not delivered;¹ nor even if delivered, if such is the intent of the parties.² So if a policy by its terms is not to cover the risk while a premium is overdue, a loss after the time when the premium is due, and before it is paid, must be borne by the insured, though the policy is not absolutely void.³ If the premium be not paid during the life of the insured, with his knowledge and consent, there is no contract. The unauthorized payment by a third person will not be an acceptance of the terms of the policy by the insured.⁴ And if the policy is not to be valid till the premium be paid, and, if not paid in fifteen days, to be void, neither party is bound till the premium is paid.⁵ The premium is paid when the money is delivered to the expressman designated by the insurers, to be forwarded to their agent.⁶ It is from that time at the risk of the insurers.⁷

§ 341. **Premium; Non-payment; Forfeiture.** — An insurance company whose charter provides that on non-payment of the premium the directors may forfeit, may also contract that

¹ *Schwartz v. Germania Life Ins. Co.*, 18 Minn. 448; *Flint v. Ohio Ins. Co.*, 8 Ohio, 501.

² *Bodine v. Exch. Fire Ins. Co.*, 51 N. Y. 117. See *post*, § 346.

³ *Wall v. Home Ins. Co.*, 36 N. Y. 157. See also *post*, §§ 341 *a*, 345 *et seq.*, and § 357.

⁴ *Whiting v. Massachusetts, &c. Ins. Co.*, 129 Mass. 240.

⁵ *Bradley v. Potomac Fire Ins. Co.*, 32 Md. 108.

⁶ *Whitley v. Piedmont, &c. Life Ins. Co.*, 71 N. C. 480.

⁷ *Currier v. Continental Life Ins. Co.*, 53 N. H. 538.

such non-payment shall work a forfeiture, in which case no action of the directors will be essential.¹ If the policy by its terms is forfeitable for non-payment of premium, or any note given for a premium, when due, a failure to pay at maturity a note given for a part of the premium, or any instalment or interest thereon, when due, works a like forfeiture. Such a stipulation is neither unconscionable nor usurious. And the fact that no notice is given by the insurers of the time when the note becomes due will not avail the insured, or an assignee ignorant of the existence of such a note, since they are under no obligation to give such notice.² In *Pitt v. Berkshire Life Insurance Company*, the policy purported to be in consideration of \$86.40 to the defendants "in hand paid," and of a like sum to be annually thereafter paid, and was conditioned to be void in case the insured should fail to pay when due any notes or other obligations given for premium. In point of fact, only a part of the first premium was paid in hand in cash, and for the balance a note was given which set forth on its face that if not paid when due the policy should be void, in accordance with the conditions of the policy. And the note being payable in instalments, and being expressed to be for the unpaid balance of the premium, it was held that the giving the note was not a payment of balance due of the premium, and that the forfeiture insured on non-payment of the instalment first due.³ An attempt was made in *Windus v.*

¹ *Equitable Ins. Co. v. McLennon* (Tenn.), 6 Ins. L. J. 124.

² *Robert v. The New England Mut. Life Ins. Co.*, 1 Disney (Supr. Ct. of Cincinnati), 355, Gholson, J.; *Pitt v. Berkshire Life Ins. Co.*, 100 Mass. 500; *Shaw v. Berkshire Life Ins. Co.*, 103 id. 254; *Attorney-General v. North American Ins. Co.*, 80 N. Y. 152; *How v. Union Mut. Life Ins. Co.*, id. 32; *Nedrow v. Farmers' Ins. Co.*, 43 Iowa, 24; *Lewis v. Phoenix, &c. Ins. Co.*, 44 Conn. 72; *Mason v. Citizens', &c. Ins. Co.*, 10 W. Va. 572; *Southern Mut. Life Ins. Co. v. Taylor* (Va.), 10 Ins. L. J. 208; *Moses v. Phoenix, &c. Ins. Co.*, 2 St. Louis Ct. of App. 408; *Patch v. Phoenix Life Ins. Co.*, 44 Vt. 481; *Williams v. Wash. Life Ins. Co.*, 31 Iowa, 541; *Security Life Ins. Co. v. Gober*, 50 Ga. 404; *Russum v. St. Louis, &c. Ins. Co.*, 1 Ct. of App. (Mo.) 238; s. c. 5 Big. Life & Acc. Ins. Cas. 243; *Catoir v. American Life Ins. & Tr. Co.*, 33 N. J. 487; *Baker v. Union Life Ins. Co.*, 43 N. Y. 283, reversing s. c. 6 Robt. (N. Y. City Sup. Ct.) 393. See *post*, § 344 a.

³ *Ubi supra*. See also *Bigelow v. State, &c. Ins. Co.*, 123 Mass. 113. But in Kentucky, it has been held that, where the premium is paid partly in cash and

Lord Tredegar¹ to recover a lapsed policy, after omission to pay the annual premium, and after the insured had taken out a new policy in a new office. The original policy was issued at a time which, if it was still in force, would entitle it to certain valuable bonuses; and many years after the lapse of the policy the executors of the insured brought their bill in equity to recover the policy on the ground that it had lapsed by accident, the insured not having received the usual notice, by reason of his change of residence. But the Master of the Rolls, the Lord Justices, and the House of Lords on appeal to them, scouted the bill. When the premiums are payable thrice yearly in advance, one-third to be indorsed as a loan, this means that the second instalments are to be paid at the expiration of four and eight months respectively, and the policy is forfeited unless each payment is made in advance; and the reserved right of the insurers to deduct unpaid premiums from losses refers to the indorsements, and does not release the insured from the obligation to pay in advance.²

§ 341 *a*. **Non-Payment of Premium** (*continued*). — A policy for five years, subject to the condition that if the annual premium shall not be paid within thirty days after it falls due, the policy shall be void during default, although a note be given for the payment of the several premiums as they become due, is an absolute insurance only for the year in which the premium is actually paid. It becomes void on non-payment of each successive premium within thirty days after the expiration of the previous year, but is renewed for the balance

partly in a note, which is regarded as practically a loan to the insured secured by the profits or dividends which may be earned, while a failure to pay the cash premium, or any note which may be given for it, promptly works a forfeiture, a failure to pay the interest on the note as it accrues will not, although the policy provides that failure to pay in advance annually the interest on unpaid notes or loans on account of annual premiums shall terminate the policy. The court makes a distinction between the prompt payment of premiums and the prompt payment of interest, which is in no sense a premium, on premium notes. *St. Louis Mut. Life Ins. Co. v. Grigsby*, 10 Bush (Ky.), 310. See also *post*, § 348.

¹ 15 L. T. n. s. 108, H. L.

² *Howard v. Continental Life Ins. Co.*, 48 Cal. 229; *Hesterberg v. Equitable Life Ins. Co.*, 1 Cincinnati Supr. Ct. Repr. 483.

of the year on payment after that time. The payment of the premium is optional with the insured, and if he make default, the insurer has no other remedy than the avoidance of the policy. If the policy be voidable only at the option of the insurer, it may be different.¹ The case is distinguishable, as to the right of recovery on the premium note, from those cases where the policy provides that on failure to pay an instalment the whole note may be recovered.² In another case, the language of which is entirely inconsistent with the doctrine of Yost's case, under a policy which provided that on payment of all overdue instalments the policy should again attach, it was held that the insurers might recover, in an action on the note after the expiration of the policy, all the overdue instalments, and it was also said that this would revive the policy.³ Where the provision of the policy was that the com-

¹ Yost v. American Ins. Co., 39 Mich. 531; American Ins. Co. v. Cougle, 39 Mich. 536. See also New York Life Ins. Co. v. Statham, 5 Big. Life & Acc. Ins. Cas. 607, Strong, J.

² Williams v. Albany City Ins. Co., 19 Mich. 451; American Ins. Co. v. Klink, 65 Mo. 78.

³ American Ins. Co. v. Henley, 60 Ind. 515. But the Superior Court of Michigan adheres to the doctrine of Yost's case, in American Ins. Co. v. Stoy, 41 Mich. 385, in an elaborate opinion, an abstract of which is as follows:—

“The written application made was ‘for insurance against loss for the term of five years from the 12th day of August, 1875.’ By the policy the company, in consideration of \$6.10 cash premium and an instalment note, insured against such loss as should happen during the term of five years, commencing Aug. 12, 1875, and terminating Aug. 12, 1880. In the application the rate is fixed at sixty cents, and but for one year. The amount insured is \$1,016, the first instalment] payable in cash is, therefore, \$6.10. The instalment note is given for \$24.38, and makes the assured promising therein to pay Aug. 1, 1876, \$6.10, and a similar sum Aug. 1, 1877, also on Aug. 1, 1878, \$6.09, and a like sum Aug. 1, 1879. In the application it is stated that ‘if any instalment upon the premium shall remain due and unpaid thirty days, then the policy issued upon the application *in consideration of such instalment* shall be null and void until the same is paid.’ The policy substantially repeats this, and further recites that the company ‘shall not be liable to pay any loss happening during the continuance of such default in the payment of such instalment, but on payment by the assured or his assigns of all instalments of premium due under this policy, or upon the instalment note given therefor, the company's liability shall revive, and this policy shall be in force as to all losses happening after such payment. . . . When a promissory note is given by the assured for the cash premium, it shall be considered a payment of such premium, provided such note is paid at or before maturity, . . . and no attempt to collect such note or any instalment

pany should not be liable while a note given for a premium should be past due or unpaid, it was held that the policy was suspended, and did not cover a loss during that time.¹

of premium due . . . shall be deemed a waiver of any of the conditions of this policy, or have the effect to revive it.’

“*Held*, 1. That these provisions are inconsistent with the clause declaring the policy to be for a term of five years, and taken together they mean that a yearly policy has been issued upon the instalment plan, to run for a period not exceeding five years. This is especially clear from the provision of the policy whereby the company ‘reserved the right of cancelling this policy at its election, by paying to the assured the *unearned* premium, if any there be.’ The company could not retain and collect the note or deduct the amount before due from the amount of the loss. As to all subsequent instalments after the loss there would be no risk on the company’s part, which is absolutely essential to the right to recover premium in such a case.

“2. The provision of the company’s charter that in case of refusal or neglect to pay any instalment for thirty days the whole note shall become due and payable, is not binding on defendant. The relations existing between the parties are not like those of persons insuring in a mutual company, where the assured becomes a member of the company and bound by all its rules. The company may have authority under its charter to carry on business on the mutual plan; but such is not the contract here. The clause in the policy referring to the charter only makes it a part of the policy to explain such rights and obligations as are not otherwise provided for by the terms of the agreement. Here, however, the policy fully provides for all the rights and obligations of both parties so far as they are in issue, and the charter provisions cannot be admitted to change in important matters the deliberate agreement entered into. The case in its facts is therefore not like *Williams v. Albany City Ins. Co.*, 19 Mich. 451.

“3. The words ‘null and void’ as used in the policy do not mean voidable. A payment by the assured revives the policy from that date, but gives no life to it covering the period it was suspended. Parties may agree that on the happening of a certain contingency their agreement shall become absolutely void, but may again take effect from the happening of another event at either party’s option.

“4. The argument is unsound that as the policy was suspended by the mere wrongful act of the assured in not paying the instalment when due, and as he could revive the policy by paying, he should not be heard to complain of any hardship resulting from his own wrong in not paying as he promised. Parties often take advantage of some positive provision of law to aid them in maintaining a defence to an action, where in so doing they take advantage of something done by themselves which they ought not to have done. And here, under our construction of the contract, the assured is at liberty to decline at the end of the year to renew at all; he is therefore guilty of no wrong whatever.”

In *Klink’s* case the words of the policy were, “in part or whole consideration of such note or notes.”

¹ *Garlick v. Mississippi, &c. Ins. Co.*, 44 Iowa, 553. See also *Schmidt v. Insurance Co.*, 41 Ill. 295.

§ 342. **Non-payment of Premium** (*continued*). — But when the policy is forfeitable for non-payment of the premium, but does not distinctly provide that the non-payment of a note given therefor at maturity shall work a forfeiture, as this clause is inserted for the benefit of the insurers it must be taken most strongly against them, and the non-payment of the note at maturity will not work a forfeiture.¹ The courts will not extend the operation of a condition, the breach of which involves a forfeiture,* to a case not clearly within it. Thus, where two notes were taken, one subject to the condition and the other not, the failure to pay the latter was held not to work a forfeiture.² And though the note itself be made payable in six months, and by the terms of the note the policy is to be void if the note be not promptly paid at maturity, it has been held that the non-payment of the note only renders the policy voidable and not void, so that the policy continues in force unless the insurers do some act to show that they insist upon the forfeiture.³ The case referred to was this: —

A mutual life insurance company insured the life of a member for a certain annual premium, to be paid at the beginning of each year, and, if not so paid, the policy was to cease and determine, the insured to forfeit all moneys paid and all rights under such policy. The insured paid three annual premiums, but gave his promissory note for the next year's premium, the taking of which the company assented to, payable six months after date, bearing interest at a higher rate than the rules, &c., of the company provided for. The note on its face was "for premium on policy No. 25,187, and if not paid at maturity, said policy is to be void." The note was not paid at maturity, nor did the company demand payment of the maker, on the day it became due, but urged payment at other times. The maker was solvent. When the next year's premium would have fallen due, by the terms of

¹ *McAllister v. New England Mut. Life Ins. Co.*, 101 Mass. 558.

² *New England Mut. Life Ins. Co. v. Hasbrook*, 32 Ind. 447.

³ *Mut. Ben. Life Ins. Co. v. French*, 2 Cincinnati Superior Court Reporter, 321; affirmed, 30 Ohio St. 240; *La Compagnie D. Ass., &c. v. Grammon* (Q. B. Montreal), 3 Legal News, 19. But see *Thompson v. Knickerbocker, &c. Ins. Co.*, C. Ct. (Ala.) 5 Big. Life & Acc. Ins. Cas. 8.

the policy upon a tender made of it to the agent of the company, the latter refused to receive it, claiming that the risk had determined by reason of non-payment of the note, and demanded back the receipt given for the previous year's premium, but continued to hold the note. In an action brought after the death of the insured, to recover upon the policy, the action was sustained by the court. In giving its opinion the court said : —

“Now, what is the legal effect of the policy itself? It is an agreement to insure the life of French from year to year during his life, on the payment to it each year of a certain amount of money as a premium for the risk taken. His failure to pay such premium at the beginning of each year, unless waived by the company *ipso facto*, would cause the policy to ‘cease’ and determine. It was a contract that could only continue from year to year, at *the option* of the insured, who could let it drop at any time. If, on July 6, 1867, the insured had said to the company, ‘I will not pay; I do not wish to insure longer in the company,’ it could not have compelled him to do so; it could not have sued and recovered from him that or any subsequent year's premium. Its remedy was provided against the insured by the forfeiture of all his moneys previously paid and rights under the policy. Hence the payment of each year's premium was a *condition precedent* to the further existence of the contract.¹

“Had this note been taken in pursuance of any stipulation of the policy, or rules or laws of the company authorizing it as a method of paying the annual premium, it would then have been a condition precedent to the continuance of the policy, which would have ceased and determined, as of July 6, 1867; but if not so provided for, this would not necessarily be so.²

“Let us, then, inquire whether the note given in this case could have been sued upon and recovered by the company

¹ See *Mut. Ben. Life Ins. Co. v. Jarvis*, 22 Conn. 133.

² *McAllister v. New England Mut. Life Ins. Co.*, 101 Mass. 558; *Robert v. New England Mut. Life Ins. Co.*, 1 Disney, 355; s. c. 2 id. 106, 107; *New England Mut. Life Ins. Co. v. Hasbrook*, 32 Ind. 447, 449.

after it became due, or whether the maker could have successfully defended against it, on the ground that he had elected to insure no longer with the company. We think he could not. The risk for the whole year would have commenced; the policy for that year would have attached, and the company would have carried it six months and three days, liable in case of the insurer's death during the whole time. The payment of the note became a condition *subsequent*, which only the company could avail itself of. There would have been an election on the part of the insured to insure for another year, and not a refusal to do so, as if he had not attempted to pay the premium for the year, in which case there would have been no liability on his part. Such terms in the note made the policy merely *voidable* at the option of the company. Forfeitures are not favored, especially where delay can be compensated for in money.¹

“ Still the company might have forfeited the policy on non-payment of the note when it became due, but it should have exercised the right promptly. It should have demanded payment on the last day of grace, during the business hours of the day; and if such payment was not then made, it should have declared the policy forfeited or void. This is in accordance with well-settled rules for enforcing forfeitures for breaches of condition subsequent. No such demand is required in the case of the non-performance of *conditions precedent*, as the stipulation in a policy for the payment of annual premiums, though it is usual for companies to notify parties a few days in advance of the time such annual payments are to be made; but this is mere accommodation. The company, then, did not determine or make void this policy when the note fell due, and it became a mere debt, like the check given for the other half of that year's cash premium.”² And even a parol agreement to pay may be so far a payment as to prevent a forfeiture of the policy by the

¹ Boyd v. Talbert, 12 Ohio, 212, 214; Smith v. Whitbeck, 13 Ohio St. 471.

² Mut. Ben. Life Ins. Co. v. French, 2 Cincinnati Superior Court Reporter, 321; s. c. 4 Big. Life & Acc. Ins. Cas. 369; affirmed, 30 Ohio St. 240.

mere fact of non-payment.¹ In such case, however, the insured is not entitled to his paid-up policy till the notes given in part payment of the premiums are themselves paid.²

[§ 342 A. On failure of the assured to pay the premium the policy, if so conditioned, at once becomes void, without notice or other act.³ If the premium is paid by a foreign bill drawn by the insured, and the policy is to be void if the bill is not paid at maturity, forfeiture follows the non-payment of the bill on proper presentment at maturity *without protest*, although protest might be necessary to fix the liability of the drawer on the bill.⁴ Those beneficially interested in the policy cannot avoid the effects of the non-payment of a premium note. It was their duty to have protected themselves by seeing that it was paid.⁵ Failure to pay interest on a loan indorsed on the policy will not be fatal under a provision for forfeiture by non-payment of *premiums*.⁶ When a note is taken for the premium, and the policy delivered, non-payment of the note at maturity will not invalidate the insurance.⁷]

§ 343. **When no Provision for Forfeiture; Suspension of Policy.** — If, however, the policy contains no such proviso, though the charter and by-laws require the payment of annual premiums, the non-payment of the annual premium when due does not work a forfeiture. Such a policy insures for the number of years stipulated absolutely, leaving the annual payment of the premium to be enforced, not as a condition, but as a part of the consideration agreed to be paid.⁸ So if the policy is merely suspended while a premium or instalment remains unpaid, a payment, even though upon a

¹ See *post*, § 346.

² *Moses v. Brooklyn Life Ins. Co.*, 50 Ga. 196. But see *Home Ins. Co. v. Pierce*, *post*, § 345 *a*.

³ [*Roehner v. Knickerbocker Life Ins. Co.*, 63 N. Y. 160 at 163; *Ashbrook v. Phoenix Mut. Life Ins. Co.*, 94 Mo. 72, even an entry on the company's books is not necessary.]

⁴ [*Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696.]

⁵ [*Continental Ins. Co. v. Daly*, 33 Kans. 601.]

⁶ [*Gardner v. Union Cent. Life Ins. Co.*, 5 Fed. Rep. 430; 6th Cir. (Ohio), 1880.]

⁷ [*La Compagnie d'Ass. des Cultivateurs v. Grammon*, 24 L. C. Jur. 82.]

⁸ *Woodfin v. The Asheville Mut. Ins. Co.*, 6 Jones (N. C.), 558.

judgment recovered in a suit therefor, will revive the policy.¹ [But a *part* payment will not remove the suspension.² Where a policy is to be void by non-payment of a premium, yet capable of revival by subsequent payment, the company is not liable for loss occurring after default and before revivor, nor does it earn premiums during the period of suspension.³]

§ 344. Under the following special and peculiar facts a policy was, after much fluctuation of judicial opinion, held void. The policy was headed as follows: "Annual premium, £33; whole term, payable by quarterly instalments of £8 5s. each." The policy was dated Aug. 2, 1856, and recited that "the assured had paid £8 5s. as the premium till 2d of November." It also stipulated that if the insured should die within twelve calendar months from the date thereof, or should live beyond such period, and should on or before that period, or before the expiration of every succeeding twelve calendar months, pay the annual amount of premium, the insurers should be liable; with a proviso, however, that if the insured should die before the whole of the quarterly payments shall become payable for the year, the directors might deduct from the sum insured the whole of the premium for that year, reckoning it to commence from the 2d of August. The insured died after the third quarterly instalment had become payable, but before it was paid, and it was held in the Queen's Bench that the non-payment of the third instalment rendered the policy void, on the ground that this was a policy from quarter to quarter, leaving to the assured liberty to drop it at the end of any quarter, and not imposing any continuing liability on the insurer, unless the quarterly payment is made at the end of the quarter; and further, that the condition as to the payment of all the quarterly premiums was a condition precedent.⁴ This judgment, however, was reversed in the Exchequer Chamber,⁵ on the ground that the insurance was an annual insurance for a

¹ American Ins. Co. v. Klink, 65 Mo. 78.

² [Curtin v. Phoenix Ins. Co., 78 Cal. 619.]

³ [Matthews v. Insurance Co., 40 Ohio St. 135, 138.]

⁴ Sheridan v. Phoenix Life Ass. Co., E., B. & E. 156. ⁵ Ibid. 160.

year, and from year to year, time being given to pay the annual premium by quarterly instalments; and that the absence of any express promise to pay, and of any provision as to the consequence of non-payment of the quarterly premium, prevented their payment from being a condition precedent. But this judgment was again reversed in the House of Lords, on the ground that the "annual amount" of the premium had not been paid, and the proviso was not meant to apply to the case of a default of payment, but to the case where the payments had been regularly made as they became due, but when all the instalments had not become due.¹

The testimony of an experienced actuary is admissible on such a question.²

§ 344 *a*. **Non-forfeitable Policy ; Proportionate Payments.** — Where, however, a policy indorsed "non-forfeiting life policy" contains the provision that if, after the receipt of two or more annual premiums, the policy should "cease" by reason of non-payment of premiums, then, upon a surrender within twelve months from the time of "such ceasing," a new policy will be issued for "such sum as is proportionate with the annual payments which have been made," and also a provision that, if the premiums shall not be paid the insurers shall only be liable for so much of the loss "as is proportionate with the annual payments made, as above specified," the insured has an absolute claim for such proportionate insurance, whether surrendering the policy within twelve months or not. Such, reading the two provisions together in the light of the rule that language working forfeiture will be strictly construed against a forfeiture, is their fair import. They serve to enable the company, in certain contingencies, to get rid of a bad risk, but not to convert a policy declared to be non-forfeitable into a forfeitable one, or to relieve them from a liability which they admit. Cancellation of the policy by the insurers is of no avail.³ And it

¹ Phoenix Life Ins. Co. v. Sheridan, 8 H. L. Cas. 745.

² Greenfield v. Massachusetts Life Ass. Co., 47 N. Y. 430.

³ Chase v. Phoenix, &c. Ins. Co., 67 Me. 85. See also Fitch's Case, *ante*, p. 223, n. 2.

was held in a later case in the same court that an administrator of the deceased insured might under a similar policy not declared to be non-forfeitable, recover such proportionate sum within twelve months after "the ceasing" of the policy. Nor is it necessary in such cases to surrender the old policy.¹ And where two annual premiums were paid, part in cash and part in notes on interest, and, though the policy was not declared non-forfeitable, the notes provided that it was to be forfeitable if the interest on such notes was not paid when due, it was held that a failure to pay such interest did not work a forfeiture as to the "proportionate part" of the amount insured, two annual premiums having been paid in cash and notes.²

¹ *Dorr v. Phoenix, &c. Ins. Co.*, 67 Me. 438. See also *Coffey v. Universal, &c. Ins. Co.*, 10 Ins. L. J. 525. In *Bussing v. Union, &c. Ins. Co. (Ohio)*, 8 Ins. L. J. 218, it was held, no time being fixed by the policy, that the new paid-up policy must be demanded while the first policy was in force. In *Dutcher v. Brooklyn Life Ins. Co.*, it was held that, under the peculiar conditions of the policy and the practical construction of them by the company, the insured was entitled to a paid-up policy, without payment of his premium notes, which the court held were only to be paid when the policy became payable, although the policy was to be issued for as many tenths "as there have been annual premiums in cash." s. c. affirmed, 5 Repr. 61. See *post*, § 363 a.

² *Ohde v. Northwestern, &c. Ins. Co.*, 40 Iowa, 357. "One of the conditions of the policy is that if the premiums, or the interest upon any note given for premiums, should not be paid on or before the days mentioned in the policy for the payment thereof, then in every such case the company should not be liable for the payment of the whole sum assured, and for such part only as is expressly stipulated in the policy.

"This express stipulation is as follows: 'And the said company further promise and agree that if default shall be made in the payment of any premium, they will pay, as above agreed, as many tenth parts of the original sum insured as there shall have been complete annual premiums paid at the time of such default.' What then is to be considered as the payment of complete annual premiums? It is, we think, quite clear from the whole contract that the entire premium for each year was to be ninety-two dollars and ninety-three cents, payable in two semi-annual cash payments of twenty-four dollars and eighty-four cents each, on the 12th days of July and January, and the execution of a note to the company for the sum of forty-three dollars and twenty-five cents, with interest at seven per centum; that these cash payments were to be made, and such a note executed each year for the first ten years of the policy; that it is not contemplated that these annual premium notes are to be paid each year as a condition to the continuance of the policy. On the contrary, the second condition in the policy expressly provides for and requires only the interest upon these notes to be paid together with the cash premiums.

§ 344 b. **Endowment Policy non-forfeitable under Massachusetts Statute.**—In *Carter v. John Hancock Life Insurance*

“ This condition exonerates the company from liability to pay the whole sum in case the premiums or the interest upon any notes given for premiums shall not be paid, &c. This language is utterly inconsistent with the idea that a failure to pay the principal of these notes annually should work a forfeiture of the policy to any extent. The agreement is to pay money and give notes bearing interest each year, and to pay the interest accruing upon these notes. It is beyond question that the assured would have no right to insist that the company should receive the entire premium in cash, for that they have not agreed to do; they have stipulated for interest-bearing notes instead. More than this, the assured was under certain circumstances entitled to have his share of dividends applied on the notes, which also proves that these notes were to be made annually, the interest to be paid annually by the assured, and the principal to remain unpaid except as dividends were applied to that end, and to be liens on the policy until they should become due by limitation, or death of the assured, when they should be deducted from the policy.

“ The doctrine is well settled in this State that the giving of a note does not operate as payment of a precedent debt, unless it be so agreed by the parties; but that doctrine does not apply to this case. Here the agreement on the part of the assured was to make certain semi-annual cash payments, and execute annual notes, and to pay the interest falling due upon such notes, — the payment of the principal of the notes being otherwise provided for, first by dividends due the assured, and second, by deduction from the amount of the policy when that became payable. It follows, therefore, that when the assured had made the semi-annual cash payments in July and January, executed and delivered his note for the balance of the premiums as stipulated in the policy, and paid the interest due, if any, on the previously executed note or notes, then a complete annual premium was paid. This the assured performed for two years, which entitled his widow, upon his death, to two tenths part of the whole sum named in the policy, deducting therefrom the amount of the two premium notes and their accrued interest.” *Little v. Northwestern, &c. Ins. Co.*, Superior Ct. (Indianapolis), 5 Ins. L. J. 149; s. c. affirmed, 56 Ind. 504; *Hull v. Northwestern &c. Ins. Co.*, 39 Wis. 397. In this case, however, the policy was indorsed, “ This policy is non-forfeitable. Each complete yearly payment secures its proportion of the policy.” *Northwestern, &c. Ins. Co. v. Bonner* (Ohio), 9 Ins. L. J. 684; *Kirkpatrick v. Knickerbocker Life Ins. Co.* (Tenn.), 6 Ins. L. J. 368; *Symonds v. Northwestern, &c. Ins. Co.*, 23 Minn. 491; *Mound City, &c. Ins. Co. v. Twining*, 12 Kans. 475; *Nettleton v. St. Louis, &c. Ins. Co.*, C. Ct. (Ind.), 6 Ins. L. J. 426; *Watts v. Atlantic, &c. Ins. Co.* (Ont. Q. B.), 16 Can. L. J. 215; *Montgomery v. Phoenix, &c. Ins. Co.* (Ky.), 8 Ins. L. J. 300. Where the annual premiums are paid by notes of a third person, and renewal receipts are given, a paid-up policy cannot be refused because the notes are unpaid. *Michigan, &c. Ins. Co. v. Bowes*, 42 Mich. 19. But the note of the insured and a renewal receipt will not renew beyond the maturity of the notes. *Wilmot v. Charter Oak Ins. Co.*, 46 Conn. 483. On the other hand it was held in *Smith v. Continental Ins. Co.* (Dist. Ct. of Phila.), 3 Ins. L. J. 63, that even where a policy was declared non-forfeitable, it was nevertheless forfeited if the policy was not actually

Company,¹ the case, which cannot well be abridged, was this, Soule, J., giving the opinion:—

“The plaintiff holds a policy on his own life, issued by the defendant, dated in August, 1866, and payable to a person named in it in case of the plaintiff’s death within ten years, but to the plaintiff if he should survive that period. It is termed an endowment policy. It contains an express condition ‘that if any premium due upon this policy shall not be paid at the day when the same is payable, this policy shall thereupon become forfeited and void; this condition, however, being subject to the provisions of the 186th chapter of the acts of the legislature of Massachusetts in the year 1861, entitled “An act to regulate the forfeiture of policies of life insurance.”’ The plaintiff paid in cash or by his own notes all the several annual premiums except the last one due in August, 1875. This he did not pay. The company had due notice that the plaintiff had survived the period of ten years named in the policy. The question to be decided is, whether, notwithstanding his failure to pay the last premium,

surrendered within the limited time. In *Schumacher v. Manhattan Life Ins. Co.*, C. Ct. (Mo.), 3 Ins. L. J. 455, to the same effect, the policy was not declared non-forfeitable. See also *Winchell v. John Hancock Life Ins. Co.*, C. Ct. (Mass.), 8 Ins. L. J. 652, where it was held that equity could not relieve against neglect to comply with conditions upon which the statute made a policy non-forfeitable, but where, however, it was held that under a policy which, “at any time” after the payment of one annual premium, gave the insured the option to surrender and secure a paid-up policy for a proportionate amount, that the insured or his administrator might, at any time before the next annual premium becomes due, choose between a policy as provided by the statute, or a paid-up policy as provided by the contract, and if he did not choose the former he forfeited only that, but still retained his right to a paid-up policy. In *Knapp v. Homœopathic Life Ins. Co.*, C. Ct. (Mass.), 10 Ins. L. J. 84, the policy was held forfeited because the insured did not exercise a similar option, given by the contract within the ninety days limited by the terms of the contract. The non-forfeiture law of Massachusetts St. 1861, c. 186) is applicable to policies issued by foreign insurance companies at their home offices to residents of Massachusetts, if the companies consent to do business in the State, subject to its laws. *Morris v. Penn., &c. Ins. Co.*, 120 Mass. 503; *Holmes v. Charter Oak, &c. Ins. Co.* (Mass.), 10 Ins. L. J. 348. But by Stat. 1880, c. 232, such law is not to apply to policies issued after Dec. 31, 1880. So it was held in *Smith v. Mut. Life Ins. Co.*, U. S. Dist. Ct. (Mass.) January, 1881. See also *post*, § 363 a.

¹ 127 Mass. 153.

he is now entitled to recover the amount of the insurance. This depends on the effect to be given to the reference in the policy to the statute of 1861. It is not necessary, in deciding this case, to consider the question whether the statute of 1861 applies, by its own force, to endowment insurance policies, so called, because the forfeiture clause in the plaintiff's policy is in terms made subject to the conditions of that statute. The only question, therefore, is as to the construction to be given to the forfeiture clause thus qualified.

“ The defendant contends that the effect of the statute when incorporated into the policy is merely to keep it alive for a certain period of temporary insurance after the failure of the insured to pay the stipulated premium when due, and to make the sum insured payable only in case of the death of the insured before the expiration of that period. The plaintiff, on the other hand, contends that the effect is to make the sum insured payable if either the death of the insured or the expiration of the ten years occurs during the period of temporary insurance. The defendant relies on the language of the second section of the statute, which provides that if the death of the insured occurs within the term of temporary insurance, the company shall be bound to pay the amount of the policy ; and argues that as the statute specifies the death as the contingency on which the liability to pay depends, there can be no liability after the failure to pay the premium, except in case of death.

“ It is to be observed, however, that the purpose of the statute is merely to establish a rule which shall enable the insured to reap the full benefit of premiums paid before default on his part, and at the same time to secure to the insurance company, in case it is obliged to pay, the full amount of the premiums which the terms of the policy call for. It is not the purpose of the statute to make a new contract between the parties, nor to make any change in the time when the amount of the policy becomes payable. No difficulty of construction arises when the statute is to be applied to a policy for life without the endowment feature. Such policy is payable on the death of the assured, and the lan-

guage of the statute is equivalent to saying, 'If the event, on the happening of which the policy becomes payable, occurs during the term of temporary insurance, the company shall be bound to pay.' As applied to a pure life policy, the words of the statute cannot have any other meaning than this; and when the statute provisions are adopted in an endowment policy, for the purpose of qualifying the forfeiture clause, the clause thus qualified is to be so construed as to give the insured its full benefit, without altering any other provision of the policy, if this can be done without violating any rule of law. In the endowment policy, the expiration of ten years from its date is the occurrence of an event on the happening of which the policy becomes payable. As regards the right to receive, and the obligation to pay the amount of the policy, it is equivalent to the death of the insured in a pure life policy. In construing the forfeiture clause, as qualified by the importation of the statute into it, we must, therefore, regard the expiration of ten years as equivalent to the death of the insured, so far as regards the question when the policy becomes payable. There is no hardship to the defendant in this construction, because it is permitted to deduct from the amount of the policy all unpaid premium, with interest from the day it became due to the day when the amount of the policy becomes due, so that it is put in precisely the same position in which it would have been if the premium had been duly paid. The construction contended for by the defendant might impose serious hardship on the insured. The premium provided for by policies is fixed with reference to the endowment feature, and is, of course, much larger than is paid for a pure life policy when the age of the insured is such that his expectation of life is largely in excess of the period at the end of which the amount of the policy is made payable. It would be altogether to the advantage of the insurance company to hold that the policy should be payable only in case of death within the term of temporary insurance, though such term might run for years after the end of the period named in the policy, and that the company in case the life dropped might deduct from the amount of the policy

the large unpaid endowment premium with the accumulated interest during those years. The more valuable the policy at the time of the default, the greater might be the advantage to the company in such case.

“The result is that, as the plaintiff survived the period of ten years, and duly notified the defendant of the fact, and the value of the policy when he failed to pay the premium was sufficient to furnish a premium for a temporary insurance for a term extending beyond the expiration of said ten years, he is entitled to recover, and the defendant is bound to pay the amount of the policy less the amount due from him to the defendant.”

§ 344 c. **Massachusetts Statute ; Indebtedness ; Amount recoverable.**—Under the Massachusetts statute a question of considerable importance arose as to what constituted indebtedness to the company which might be deducted in determining the amount of premium for temporary insurance.

Miller, J. : “The policy upon which this action is founded contained a provision, ‘that in case any premium due upon this policy, or any note given for part of the premium, shall not be paid at the day when payable, the policy shall thereupon cease and determine. The net value of the policy on that day shall be ascertained according to the “Combined Experience” or “Actuaries” rate of mortality, with interest at the rate of four per cent per annum, from which value shall be deducted whatever is due to the company, including any unpaid premium notes, with interest at six per cent per annum thereon ; four-fifths of the remaining value shall be considered a premium for temporary insurance, and the term for which it will insure shall be determined according to the age of the insured when said unpaid premium became payable upon the aforesaid assumption of mortality and rate of interest, and during said term, and no longer, this policy shall continue in force, provided no other cause of forfeiture exists,’ &c. The policy was issued in Massachusetts, and the construction to be given to the clause above cited is governed by a special statute of that state. This law provides for the continuance and validity of the policy for a limited period after the failure to pay

the premium, and for ascertaining what that period is to be, and then declares that ‘after deducting from such net value any indebtedness to the company, or notes held by the company against the insured, which notes if given for premium shall then be cancelled, four-fifths of what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium, and the assumptions of mortality and interest aforesaid.’

“The question is, what amount is to be deducted; and this must be determined by the construction to be given to the provisions of the policy of the non-forfeiture act, to which reference has been had. One half year’s premium had been paid upon the policy when it was issued, and when Selye, the insured, died, that period of time had elapsed, and the remaining half year was to be paid.

“The defendant claims that under the law cited the unpaid half of the premium for the first year is to be considered as an indebtedness, and is to be deducted from the net value of the policy, and that upon this principle the policy lapsed after the expiration of the first six months.

“Evidence was taken upon the trial of witnesses versed in calculations of this kind, and the defendant’s actuary, and another person, who was an expert in such matters, upon the assumption that the unpaid premium for the last half-year was a debt, and as such should be deducted from the net value of the policy at the close of the first six months, testify that the policy would remain in force after this time expired, which was on the thirtieth day of June, and until the seventeenth day of September, and as Selye died on the first day of October, it had lapsed and was of no avail.

“On behalf of the plaintiff, it is proved by an expert of large experience that, upon the theory that the unpaid premium is not a debt, the policy would be carried far beyond the time of Mr. Selye’s death. The question then recurs, was the unpaid premium an indebtedness which was to be deducted from the value of the policy under the non-forfeiture act? The statute in question provides that there shall be

deducted 'any indebtedness or notes' held by the company. No notes were held by the defendant against the insured, and there was no direct promise by him to pay any amount, or any obligation to do so. There was therefore no indebtedness within the meaning of the act. A debt means an obligation to pay a sum of money which is due or to become due by contract, as, for instance, a note, bond, or other legal obligation, which the party to whom it is due may enforce by an action brought for that purpose. No action could be maintained to recover the amount of this premium, as it rested entirely with the insured to pay or not, as he might determine.

"The policy expresses a consideration of the whole year's premium, 'per margin,' and an entry upon the margin shows that one half year's premium was paid, and the other half payable semi-annually. This does not constitute a promise to pay, either express or implied; and in case of non-payment the policy became void, except so far as it was saved by the statute. It merely indicates that if the other half is paid at the close of the six months, the risk will be extended for another six months. It is not a loan. But if it was, as the plaintiff never received the money, it should be applied in payment of the premium; and this, with the money paid, would keep the policy in force for a year, and of course at the time of the death of Selye.

"In *Worthington v. Charter Oak Insurance Company*,¹ the distinction between the premium on a policy of insurance and a debt is pointed out, and it is said that 'the theory that the premium as it becomes due is a debt, is a fallacious one, and leads to an erroneous conclusion.' In the one case the payment is entirely optional, while in the other it may be enforced at law. The position that it was a debt because it was agreed to be paid, is not, we think, well founded. The policy shows one half year's premium was paid; and if the other half was to be paid at the expiration of six months, the insurance would be continued for a year. There clearly was no agreement which obligated the insured unqualifiedly and absolutely to pay any sum, at any time which was named. If the argument

¹ 41 Conn. 416.

urged by the defendant's counsel is sound, then the same rule would apply to yearly payments which are to be made on or before December 30 in each and every year; and these are debts which can be enforced at law without regard to the wishes of the insured. According to the terms of the policy there is no promise to pay, and it rests with the insured to say how long he will continue it. He can stop it at the end of the year and determine when the policy shall cease. When he refuses to pay, the policy lapses, and the insured has no further claim, except what is conferred by the non-forfeiture clause.

"We have been referred to some decisions in the State of Massachusetts, which, it is claimed, sustain the theory of the defendant's counsel; but we think they are distinguishable from the one at bar. In one of them, notes were given for the premium, and in the other a memorandum with a promise to pay one half of the premium. It thus appears that there was an obligation in each case acknowledging an indebtedness and binding the insured to pay, which was a debt that could be enforced; while in the case at bar no such promise exists, and none is shown by the policy. The difference referred to is quite sufficient to take this case out of the rule laid down in the decision cited. The result is that the unpaid premium was not an indebtedness within the statute, and that the policy remained in force at the time of Selye's death." ¹

[§ 344 D. **Paid-up Policies.**— Sometimes the policy contains a condition that default of premiums shall not work a forfeiture, but shall convert the policy into a paid-up policy for the amount of the premiums paid. In such case the conversion may take place at any time, by notice to the insurer.² Sometimes a policy is so worded as to be void upon default of a premium with a right to call for a paid-up policy of some kind, but to be totally void by default of the interest due on notes given for prior premiums.³ A paid-up policy is a con-

¹ *Goodwin v. Mass. Mut., &c. Ins. Co.*, 73 N. Y. 480.

² [*Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 264.]

³ [*Insurance Co. v. Robinson*, 40 Ohio St. 270.]

tinuation of the original policy, and is not affected by the repeal of laws in force at the time the original was issued, but which were repealed before the paid-up policy was issued.¹ An endowment policy is a life insurance policy so far as not to be liable on execution.² A life company issuing policies on the tontine or "ten years dividend" system is not a trustee of any particular fund for a holder of such policy, but is simply a debtor. The apportionment, however, is to be equitably made, and a policy-holder may come into court to secure such division.³ If in pursuance of its provisions a policy is indorsed as a paid-up policy valid for two-tenths of the sum insured, it seems that it becomes executed, and a violation of a condition as by going into the torrid zone does not invalidate it.⁴

[§ 344 E. **Forfeiture of Paid-up Policy.** — A policy, to be void on non-payment of premium, and allowing the insured after the payment of two premiums to call for a paid-up policy, only permits such call during the life of the policy. If it is forfeited by non-payment or otherwise the right ceases, and the representations of the agent or the opinion of an expert as to the interpretation usually put by insurance companies on such clauses, is inadmissible.⁵ The insured cannot demand a paid-up policy when he has allowed the original to lapse for non-payment of a premium, if such is the agreement.⁶ A policy on which a paid-up policy is to be issued on demand after two premiums have been paid, but which is generally conditioned to be void by non-payment of premiums or interest, will be forfeited even after indorsement as a paid-up policy, "subject to the conditions of the policy," if interest is not paid on the notes given for portions of the first two premiums.⁷ An

¹ [McDonnell v. Ala. Gold Life Ins. Co., 85 Ala. 401, 410.]

² [Briggs v. McCullough, 36 Cal. 542.]

³ [Uhlman v. N. Y. Life Ins. Co., 109 N. Y. 421; Bogardus v. N. Y. Life Ins. Co., 101 N. Y. 328; Marvin v. Brooks, 94 N. Y. 71; Pierce v. E. L. A. Soc., 12 N. E. Rep. 858, distinguished and the first limited.]

⁴ [Cotton States Life Ins. Co. v. Edwards, 74 Ga. 220.]

⁵ [Smith v. Nat. Life Ins. Co., 103 Pa. St. 177, distinguishing N. Y., Ohio, and Maine cases.]

⁶ [Sheerer v. Manhattan Life Ins. Co., 20 Fed. Rep. (Ky.) 1884.]

⁷ [McQuitty v. Continental Life Ins. Co., 15 R. I. 573.]

indorsement on a policy after default of premium by the company that it was to pay "\$200 subject to the terms and condition expressed in the policy," does not prevent total forfeiture by subsequent failure to keep up the *interest on prior premium notes*, as required by the policy.¹ But in Kentucky after paying premiums enough to entitle the holder to a paid-up policy, a provision for forfeiture in case of non-payment of interest on premium notes, in cash at a precise time, the company being secure of its ultimate payment, is oppressive, against public policy, and void.² And in Missouri after the number of premiums necessary to entitle the insured to a paid-up policy have been received by the company, failure to pay a note given for a subsequent premium will not forfeit the policy, although it provides in general terms that failure to pay any premium note shall have that effect.³ But a paid-up policy is not forfeited by failure to pay interest on premium notes which it appears were regarded by the company as a loan to the assured.⁴

[§ 344 F. **Time; Within thirty days, etc.** — Where a paid-up policy is to be demanded within thirty days after forfeiture the time is not of the essence of the contract. If demand is made within a reasonable time under all the circumstances it is sufficient.⁵ And a surrender of the old policy *five years* after forfeiture has been held good.⁶ But in New York where a policy provides that within thirty days after failure to pay a premium due, the holder may surrender the policy and have a new one issued "for the proportion of the amount of insurance paid for," a failure to take advantage of this clause within the thirty days is fatal, although the company's agent told the applicant at the time of issuing the policy that it was non-forfeitable and the insured had not read his policy.⁷ In a life

¹ [Holman v. Continental Life Ins. Co., 54 Conn. 95.]

² [Northwestern Mutual Life Insurance Co. v. Fort's Adm., 82 Ky. 269, 278.]

³ [Tutt v. Covenant Mut. Life Ins. Co., 19 Mo. App. 677.]

⁴ [Bruce v. Life Ins. Co., 58 Vt. 253.]

⁵ [Johnson v. Southern Mut. Life Ins. Co., 79 Ky. 403.]

⁶ [Southern Mut. Life Ins. Co. v. Montague, 84 Ky. 653.]

⁷ [Attorney-General v. Continental Life Ins. Co., 93 N. Y. 70.]

policy which declares that it will "be good at any time after three payments, for its equitable value," nothing is due upon this clause until death occurs.^{1]}

[§ 344 G. **Non-forfeitable by Estoppel.** — A company may be estopped by the conduct of its agent from denying that the insured possesses a "participation" policy or asserting that the one actually held by the insured was void for non-payment of premium.² On the other hand, in Tennessee it is held that the representation of the agent that the policy is non-forfeitable and that the insured could at any time have a paid-up policy for the full amount paid by him in premiums, is not admissible. Parol cannot be allowed to contradict a written contract.^{3]}

[§ 344 H. **Amount of Paid-up Policy or of Damages for its Refusal.** — If a policy gives the insured the option of receiving a "paid-up policy for the full amount of the premium paid," the insured is not limited to the amount of the original insurance, as where ten premiums of \$389.16 each had been paid on a \$3,000 life policy the company was required to give a paid-up policy for \$3891.60.⁴ Unless so agreed, however, the plaintiff suing for a paid-up policy promised to be given on an equitable basis, is not entitled to the amount of the premiums he has paid. A portion of that sum has been earned by the company in carrying the risk. The plaintiff should recover only the present value of the policy.⁵ On suit to recover damages for breach of a contract to give a paid-up policy, the value of the policy can be calculated with great precision. A part of every premium is absorbed in the expenses of the business, a part is earned by the company in carrying the risk, and a part accumulates on interest to respond to the particular policy and constitutes its particular value.⁶ The contract of life insurance is based on statistics,

¹ [Andrews v. Ætna Life Ins. Co., 92 N. Y. 596.]

² [Piedmont, &c. Ins. Co. v. Young, 58 Ala. 476.]

³ [Nashville Ins. Co. v. Matthews, 8 Lea (Tenn.), 499.]

⁴ [Christy v. Homœopathic Mut. Ins. Co., 93 N. Y. 345.]

⁵ [Farley v. Union Mut. Life Ins. Co., 41 Hun, 303.]

⁶ [Nashville Life Ins. Co. v. Mathews, 8 Lea (Tenn.), 499, 504-505.]

and subject to rules that admit of mathematical accuracy in the estimation of the damage resulting from breach of the contract by the insurer.^{1]}

[§ 344 I. **Alteration of Original Contract from Non-forfeitable to Forfeitable.** — If an insurer has a right to impose on the assured an obligation to pay interest annually on premium notes outstanding at the issue of a new policy in place of a “non forfeitable” policy upon which the premiums had not been kept up, it may enforce such obligation by inserting a provision of forfeiture.² Where within thirty days after default in paying a premium the insured could demand a paid-up policy for the amount of premiums paid, if on such default the company accepts a note for the premium, in which note there is a clause of absolute forfeiture of all benefits, under the policy if the note is not paid at maturity, this is an alteration of the original contract, and on failure to pay the note at maturity there is a total forfeiture, and no right to demand a paid-up policy within thirty days.^{3]}

§ 345. **Premium ; What constitutes Payment.** — When no special mode of payment is stipulated for, any mode of payment which is accepted without objection, on the part of the insurers or their agent, will suffice. Thus, the actual delivery to the agent of a check payable to the order of the agent, or mailing or sending by express such a check to his address, at his request, made at the time of the completion of the contract, is an actual payment of the premium, if the check be at the time, and afterwards, till received, continue to be good. Since no mode of payment is provided, the agent may exercise his discretion and accept any usual mode which suits the convenience of the parties.⁴ Even a payment of the premium in depreciated funds to the local agent of a foreign insurance company, if received by him according to the usual

¹ [Nashville Life Ins. Co. v. Mathews, 8 Lea (Tenn.), 499 ; Knickerbocker Life Insurance Co. v. Heidel, Id. 488 ; Mutual Life Insurance Co. v. Bratt, 55 Md. 200.]

² [People v. Knickerbocker Life Ins. Co., 103 N. Y. 480.]

³ [Holly v. Met. Life Ins. Co., 105 N. Y. 437, 444.]

⁴ Tayloe v. Merchants' Fire Ins. Co., 9 How. (U. S.) 390 ; ante, § 134 ; Currier v. Continental, &c. Ins. Co., 53 N. H. 538.

course of his business known to his principals, is a valid payment.¹ And, of course, a tender of payment in a like currency would be equivalent to the actual payment in its effect upon the obligations of the policy.² So the payment may be by note; and if the note is given and accepted as payment, it will be sufficient,³ even though the policy forbids it, if the form of the note provided by the insurers leads to the inference that the agent is authorized to take it.⁴

§ 345 *a*. **What amounts to Payment; Dividends; Mutual Accounts.**—An advance to a general agent by a sub-agent, on account of premiums thereafter to be collected, will inure as payment of the premium on a policy, negotiations for which are pending at the time of the advance, on the life of the sub-agent, for the benefit of his wife.⁵ Funds in the hands of the insurer belonging to the insured will inure as payment of a receipt for a renewal premium delivered to the insured, no demand of payment being made at the time, or called for before loss.⁶ And if a dispute arises as to what premiums are paid, and the insured directs the appropriation of money forwarded on account of premiums, the insurers have no right to make any different appropriation.⁷ So dividends⁸ stand-

¹ Robinson v. Int. Ass. Soc. of London, 42 N. Y. 54; Martine v. Int. Ass. Soc. of London, 62 Barb. (N. Y.) 181; Sands v. New York Life Ins. Co., 50 N. Y. 626; Polglass v. Oliver, 2 Cr. & Jer. 14.

² New York Life Ins. Co. v. Clopton, 7 Bush (Ky.), 179. See also New York Central Ins. Co. v. Nat. Prot. Ins. Co., 20 Barb. (N. Y.) 469.

³ Mut. Ben. Life Ins. Co. v. French, 2 Cincinnati Superior Ct. Repr. 321; affirmed, 30 Ohio St. 240; Pitt v. Berkshire Life Ins. Co., 100 Mass. 500; Mowry v. Home Ins. Co., 9 R. I. 346; Carey v. Nagle, 2 Abb. (U. S.) 156. In point of fact, it is customary for mutual insurance companies to accept part payment of the first as well as of subsequently accruing premiums in the form of a note. Of course such a note is, by the understanding of both parties, a payment *pro tanto*.

⁴ Inman v. Globe Ins. Co., C. Ct. (Ky.), 4 Ins. L. J. 719.

⁵ Thompson v. American, &c. Ins. Co., 46 N. Y. 674. So if the agent credits, and is charged. Train v. Holland, &c. Ins. Co., 62 N. Y. 598; Union Ins. Co. v. Grant, 68 Me. 229; Home Ins. Co. v. Curtis, 32 Mich. 402.

⁶ Staunton v. West. Ass. Co., 21 Upper Canada (Ch.), 578; s. c. affirmed, 23 id. 81.

⁷ Butler v. American Pop. Ins. Co., 10 J. & Sp. (N. Y.) 343.

⁸ [But profits in the hands of a mutual company, which have not yet been declared in dividends, will not be applied to the payment of premiums to pre-

ing to the credit of a member of a mutual insurance company will inure *pro tanto* as payment of premiums falling due,¹ especially if such had been the custom of the company,² and the course of business between the parties did not show that such was not their contract.³ And where the insured shares in the profits, and at the time when the annual premium becomes due cannot know what amount he will be required to pay the company, the insurers cannot insist on a forfeiture until they give the insured notice of the amount he is required to pay.⁷ Indeed, it has been broadly held that such notes are loans, and the failure to pay interest on them does not work a forfeiture, but the insurers must apply the dividends or sue on the note.⁵ In some cases the policy specially provides how the dividend shall be appropriated, not leaving the matter open to doubt.⁶

In *Ancient Order of United Workmen v. Moore*,⁷ it was

vent a forfeiture. *Mutual Life Ins. Co. v. Girard Life Ins. Co.*, 100 Pa. St. 172. Unless expressly made applicable to such purpose, the company cannot apply dividends to the payment of the interest on premium notes without the assent of the assured, at least where not necessary to save a forfeiture. *Mutual Fire Ins. Co.*, 58 Md. 463.]

¹ *Girard, &c. Ins. Co. v. Mutual, &c. Ins. Co. (Pa.)*, 10 Ins. L. J. 257.

² *Manhattan Life Ins. Co. v. Hoelzle (U. S.)*, 8 Ins. L. J. 226.

³ *Anderson v. St. Louis, &c. Ins. Co., C. Ct. (Tenn.)*, 5 Big. Life & Acc. Ins. Cas. 527; *Ohde v. Northwestern, &c. Ins. Co.*, 40 Iowa, 357; *Russum v. St. Louis, &c. Ins. Co.*, and note to same, 1 Ct. of App. (Mo.), 228; 5 Big. Life & Acc. Ins. Cas. 243; *Patch v. Phoenix Ins. Co.*, 44 Vt. 481.

⁴ *Home Life Ins. Co. v. Pierce*, 75 Ill. 426.

⁵ *St. Louis, &c. Ins. Co. v. Grigsby*, 10 Bush (Ky.), 310; *Dietz v. Knickerbocker Life Ins. Co., C. Ct. (Baltimore)*, 8 Ins. L. J. 80; *Brooks v. Phoenix Ins. Co., C. Ct. (Vt.)*, 8 Ins. L. J. 741. This doctrine, however, the court refused to follow in both *Anderson's* and *Russum's* cases, *supra*. [Notes given in part payment of premiums are really loans by the company to the policy-holder, and are to be treated accordingly. *Insurance Co. v. Bonner*, 36 Ohio St. 51.]

⁶ *Hull v. Northwestern Ins. Co.*, 39 Wis. 397. In *Wheeler v. Connecticut Mut. Life Ins. Co. (N. Y.)*, 10 Ins. L. J. 116, the dividends were insufficient to pay the premiums, and it was not necessary to decide whether, if they had been sufficient, the insurers would have been bound to apply them. Whether equity will relieve in such a case, the authorities differ. *Pro*: See *Grigsby's* case and note to *Russum's* case, *supra*. See also *Bird v. Penn Mutual Insurance Co., C. Ct. (Pa.)*, 5 Big. Life & Acc. Ins. Cas. 487; *Nettleton v. St. Louis, &c. Insurance Co.*, 6 Ins. L. J. 426. *Contra*: *Anderson's* case, *supra*, and cases therein cited.

⁷ *Ky.*, 9 Ins. L. J. 539.

held that where a member of a subordinate lodge had money due him for "sick benefits," it was not the right of his lodge to appropriate it in payment of an assessment ordered by the grand lodge, without the member's direction, Pryor, C. J., dissenting. The majority of the court based their opinion on the distinction between the funds created by assessments ordered by the grand lodge, which were for the benefit of the families of members after their death, and the dues collected by the subordinate lodges, which were for the payment of "sick benefits" to sick members.

Where a paid-up policy was substituted for a life policy, and the outstanding notes were consolidated into one, upon the prompt payment of the interest upon which the continuance of the policy was conditioned, the policy was held forfeited by failure to pay the interest as stipulated.¹

[§ 345 B. **What constitutes Payment** (*continued*). — When the company receives an order on a third person in lieu of cash for a premium, it cannot avoid the policy without giving notice of the non-payment of the order.² Where an insured brakeman gave the company an order on the railroad, which made payments thereon but after a time neglected to pay an instalment, and during the neglect the brakeman was killed, it was held that without notice to the insured that payment had not been made, the company could not take advantage of the condition of the policy to be void by non-payment. The company accepted and retained the order, and did not give any notice to the insured, and this made the matter one between itself and the railway.³ An order on a railroad company is not a payment of the premium until cashed, where the policy provides that the premium must be actually paid before the risk attaches for each period.⁴ Words and figures in the margin of the policy to the effect that one half the annual premium is payable in cash and the other half by note form part of the policy, and if this method is followed "complete annual premiums" are

¹ *Knickerbocker, &c. Ins. Co. v. Harlan*, 56 Miss. 512; *Knickerbocker, &c. Ins. Co. v. Dietz*, 52 Md. 16.

² [*National Ben. Ass. v. Jackson*, 114 Ill. 533.]

³ [*Lyon v. Travelers' Ins. Co.*, 55 Mich. 141.]

⁴ [*McMahon v. Travelers' Ins. Co.*, 77 Iowa, 229.]

paid.¹ When the premium is tendered to the agent when the application is made, but he refuses it, and says he will consider it as paid and will leave it with the plaintiff, who was his banker, till the policy arrived, when he would call and get it, the company is bound. In legal effect the money was paid to the agent and by him deposited.² A credit of the premium on the books of the company by a general agent, and a charge of the amount as received by himself in pursuance of a usage, are, as between the company and the insured, a payment.³ Receipt of the premium by the agent completes the contract and binds the company, although the agent converts the premium to his own use and a policy is never issued.⁴ The company cannot cancel a policy for non-payment of the balance of a premium which the insured has agreed with the agent to pay in groceries, and which he is ready to pay at all times.⁵ Where the general agents of an insurance company gave a policy to a physician, with the agreement that the premium should be paid in his professional services as examiner for the company, and where this was contrary to usage and not ratified by the company, it was held that the policy and the premium note given thereon were both void.⁶ Evidence may be given that the agent had no authority to receive anything but money as payment of a premium.⁷ In general an agent has no more authority than that, and where an agent wrongfully delivers a renewal receipt merely in consideration of a setting off of debts between himself and the policy-holder, the receipt does not bind the company, and the policy lapses.⁸

[§ 345 C. **Part-payment.** — Part prepayment of the premium when the contract calls for full payment, will not make the contract obligatory.⁹ Nor will payment of a *part* of the

¹ [Pierce v. Charter Oak Ins. Co., 138 Mass. 151.]

² [Hallock v. Insurance Co., 26 N. J. L. 268 at 277.]

³ [Matter of Booth, 11 Abb. N. C. 145.]

⁴ [Ide v. Phoenix Ins. Co., 2 Biss. 333.]

⁵ [Carlwitz v. Germania Fire Ins. Co., 12 Ins. L. J. 127 (N. J.), 1883.]

⁶ [Anchor Life Ins. Co. v. Pease, 44 How. (N. Y.) 385.]

⁷ [Life Ins. Co. v. Davidge, 51 Tex. 244.]

⁸ [Frazer v. Gore Dist. Mut. Fire Ins. Co., 2 Ont. R. 416.]

⁹ [Barnes v. Piedmont, &c. Ins. Co., 74 N. C. 22 at 23.]

premium entitle the insured to a proportionate amount of the insurance-money.^{1]}

[§ 345 D. **Tender** is, of course, sufficient to avoid forfeiture if in proper time and form. But tender must be made every time a premium is due. If the premium is tendered when it comes due and is refused, and again tendered when next due, but at the following due-times is not tendered, the policy is forfeited.^{2]}

[§ 345 E. **Premium Notes.** — A negotiable note may constitute payment of a premium.³ A negotiable promissory note given to a mutual company in payment of a premium may be negotiated by it, and an authority to issue policies gives authority to take such notes.⁴ A policy may be voidable by non-payment of premium notes at the time of loss.⁵ If there is not stipulation to that effect, failure to pay a premium note at maturity will not defeat the policy.⁶ And a stipulation in the premium note itself that its non-payment shall avoid the policy (no such provision being contained in the policy) is nugatory.⁷ Where a company claims a forfeiture for non-payment of a premium note, it must offer to surrender the note. It cannot forfeit the policy and keep the note.⁸ A policy is not void *ab initio* because the premiums are paid by notes which do not bind the maker, a married woman.⁹ But a premium note executed on a policy of insurance which never becomes operative is void.¹⁰ A premium note may be so written as to become due at the date of a loss under the policy, if such should occur before its regular maturity.¹¹ Where an insolvent insurance company issued a policy and

¹ [Willcuts v. Northwestern Mut. Life Ins. Co., 81 Ind. 300.]

² [Life Ins. Co. v. Le Pert, 52 Tex. 504.]

³ [East Tex. Fire Ins. Co. v. Mims, 1 Tex. Cir. Cas. § 1324; see 100 Mass. 500.]

⁴ [Farmers' Bank v. Maxwell, 32 N. Y. 579 at 582.]

⁵ [American Ins. Co. v. Leonard, 80 Ind. 272.]

⁶ [Trade Ins. Co. v. Barraciff, 45 N. J. 543.]

⁷ [Insurance Co. v. Hardie, 37 Kans. 673.]

⁸ [Johnson v. Southern Mut. Life Ins. Co., 79 Ky. 403.]

⁹ [McQuitty v. Continental Life Ins. Co., 15 R. I. 573.]

¹⁰ [Lynn v. Burgoyne, 13 B. Mon. (Ky.) 400 at 402.]

¹¹ [Schimp v. Cedar Rapids Ins. Co., 124 Ill. 354.]

took a promissory note for the premium, the insolvency not being known to the officers or agents at the time. It was held a valid contract on good consideration.^{1]}

[§ 345 F. It is not incumbent on the company to present a premium note at the residence of the maker before relying on its non-payment as a forfeiture; that provision of law relates to indorsers and does not apply between maker and payee.^{2]} Demand on a promissory note given in payment of the premium on a policy of insurance is unnecessary, and on failure to pay the same on the stipulated day, if the policy expressly declares that in such a case it shall be void, the forfeiture occurs at once and without notice.^{3]}

[§ 345 G. When the assured gave a promissory note to a mutual company to secure the premium on an open policy, he was held liable only to the extent of the subsequent insurances indorsed upon it.^{4]} If an agent agrees to take a note for the premium and to send the policy, on the understanding that it may be returned and the note demanded if the policy proves unsatisfactory, the transaction is all one contract, and the company cannot maintain that the agent had no authority to make such an agreement and still claim the right to sue on the note.^{5]} A misrepresentation by the agent as to the condition of the company is a defence to a suit for the premium,^{6]} but an informality in filing with the State auditor the required copy of its charter by a foreign insurance company, will not affect its suit upon a note given to it.^{7]}

[§ 345 H. **Recovery by Company.** — A premium note is not without consideration after its maturity, though the policy is suspended until its payment.^{8]} The company may recover on a note though the policy is to lapse during default of its pay-

¹ [Lester v. Webb, 5 Allen, 569 at 573.]

² [McIntyre v. Michigan State Ins. Co., 52 Mich. 188, 193.]

³ [Roehner v. Knickerbocker, &c. Co., 4 Daly, 512.]

⁴ [Maine Mut. Fire Ins. Co. v. Stockwell, 67 Me. 382 at 384.]

⁵ [Jacoway v. Insurance Co., 49 Ark. 320, 323.]

⁶ [Sunbury Fire Insurance Co. v. Humble, 100 Pa. St. 495, and following case.]

⁷ [American Ins. Co. v. Pressell, 78 Ind. 442.]

⁸ [Robinson v. Insurance Co., 51 Ark. 441.]

ment.¹ Where a premium note is given at long rates and it is agreed that by failure to pay any instalment the risk shall cease during the default, and that the whole note shall immediately become due upon such failure as to any instalment, the fact that the risk ceases during non-payment does not prevent the insured being bound to pay his note. Such is the clear agreement of the parties.² By express agreement the premium instalment notes may remain binding after forfeiture for non-payment of one instalment.³ When the premium note stipulates that on default of any instalment the whole amount unpaid shall become due, the company may, even after a loss for which it is not liable, the loss occurring during default, recover the whole unpaid premium.⁴ When credit is given for a premium, an after-occurring breach of condition will not affect the company's right to recover the premium, although it cancels or avoids the policy for the breach.⁵ The company may deduct the amount of an unpaid premium note from the amount of the policy.⁶ If by the terms of the policy the company may in case of loss deduct any premium unpaid, this right continues even though the statute of limitations has run on the premium note.⁷

§ 346. **Parol Agreement to pay; Days of Grace.** A parol agreement, made at the time of the annual payment of the premium, subsequent to the issue of the policy, that if anything should happen to the insured to prevent his punctual payment of the premium, the policy should not become void, but should continue in force for a reasonable time thereafter, so that the premium could be paid, is valid, though Hunt, C.,⁸ thought such an agreement could keep the policy alive upon a living subject only, and that if the insured were dead before

¹ [Limerick v. Gorham, 37 Kans. 739, 741.]

² [Continental Ins. Co. v. Boykin, 25 S. C. 323; Id. v. Hoffman, Id. 327.]

³ [Blackerby v. Continental Ins. Co., 83 Ky. 574.]

⁴ [Palmer v. Continental Ins. Co., 31 Mo. App. 467.]

⁵ [Schimp v. Cedar Rapids Ins. Co., 124 Ill. 354.]

⁶ [Currier v. Continental Life Ins. Co., 57 Vt. 496.]

⁷ [Alexander v. Continental Ins. Co., 67 Wis. 422.]

⁸ Howell v. Knickerbocker Life Insurance Co., 44 N. Y. 277. And see *post*,

the tender of the premium, although the tender were within a reasonable time, it would be ineffectual to continue the policy. And to the same effect were the observations of the court in *Baptist Church v. Brooklyn Fire Insurance Company*,¹ a case of fire insurance. "A provision in a policy already executed and delivered so as to bind the company, declaratory of a condition that premiums must be paid in advance, manifestly has no effect, except to impart convenient information to persons who may wish to be insured. As such a provision in the policy in question could have no effect upon the delivered and perfect contract in which it was contained, so it could have none to prevent the same parties from making such future contract as they please. In any subsequent agreement for a renewal or continuation of the risk, it was competent for the parties to contract by parol, and to waive the payment in cash of the premium, substituting therefor a promise to pay on demand, or at a future day. Proof of such an agreement would have no tendency to contradict or to change the written policy already in force between the parties, and which would be wholly spent before the new agreement could take its place."² But perhaps such an agreement made at the time of issuing the policy would not be provable, as tending to contradict the terms of the policy, nor a usage of the company known to the insured of allowing such days of grace, for the reason that it would be in plain conflict with its provisions;³ though the contrary has been expressly held as to the proof of a usage.⁴ Nor would a notice printed on the policy, but not made part of it, and not proved to have been seen by the insured, that acceptance of an overdue premium is but an act of grace, and cannot control the future

¹ 19 N. Y. 305.

² See also *Bodine v. Exch. Fire Ins. Co.*, 51 N. Y. 117.

³ *Ibid.*; *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 279; *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380; *Lewis v. Phoenix, &c. Ins. Co.*, 44 Conn. 72; *Candee v. Citizens' Ins. Co.*, C. Ct. (Conn.), 4 Fed. Rep. 143; *Busby v. North America, &c. Ins. Co.*, 40 Md. 572.

⁴ *Helme v. Phila. Life Ins. Co.*, 61 Pa. St. 107; *Garber v. Mut. Life Ins. Co.*, C. Ct. (Mo.), 5 Big. Life & Acc. Ins. Cas. 221; *New York Life Ins. Co. v. Eggleston*, 96 U. S. 572; *post*, § 356. See also *Morey v. New York Life Ins. Co.*, C. Ct. (Miss.), 3 Ins. L. J. 493. See also *ante*, § 179; *post*, § 361.

action of the company, avoid the effect of such proof. And the same is true where there is notice that the agent has no authority to recover overdue premiums or waive forfeiture, if the conduct and course of dealing of the company and its agent has been such as to justify in the insured an opposite conclusion.¹

§ 347. **Payment; Advertising; Board.** — Where a policy of life insurance was issued stipulating that the first year's premium was to be paid in advertising in the newspaper published by the insured, and the advertising matter was furnished by the company and duly advertised, it was held that it was incumbent upon the company to furnish sufficient amount to meet the premium, and the insured was not responsible for, and the insurance not vitiated by, a deficiency in advertising matter. It was also held that in the absence of any notice from the company to the insured that the policy would not take effect until the termination of the time of advertising, it took effect from its date.² And it seems that payment may be in board, or commercial paper, or whatever other consideration, if agreed upon by properly authorized parties.³

§ 348. **Premium; Payment.** — But it has been held that a promise by the treasurer of the insurers, where the policy has been executed but not delivered, and the by-laws make prepayment essential to the validity of the policy, that he would see that the premium was paid, or that he would take it upon himself to keep the policies good, is no payment. The act of a treasurer, under such circumstances, is not that of the agent of the company, but his own act in his private capacity.⁴ But the courts of Massachusetts give the greatest effect to the by-laws of a mutual insurance company in restricting the

¹ *Mound City Ins. Co. v. Huth*, 49 Ala. 529; *Inman v. Globe, &c. Ins. Co.*, C. Ct. (Ky.), 4 Ins. L. J. 719; *Girard, &c. Ins. Co. v. Mutual Life Ins. Co. (Pa.)*, 10 Ins. L. J. 257.

² *The Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96.

³ *Schwartz v. Germania Life Ins. Co.*, 18 Minn. 448; *Pendleton v. Knickerbocker, &c. Ins. Co.*, 5 Fed. Rep. 238.

⁴ *Buffum v. Fayette Mut. Ins. Co.*, 3 Allen (Mass.), 360.

powers of the officers and agents of the company.¹ And it is doubtful if the decision above cited would meet with approbation in most of the States.²

[§ 348 A. **Place of Payment.** — If a premium note is payable at a place named to a general agent, a payment to a local agent at another place is not a payment to the company.³ If not fixed by the terms of the contract, parol is admissible to show an understanding between the assured and the agent as to the place of payment.⁴]

§ 349. **Premium ; Time of Payment ; Sunday.** — A premium due on a certain day must be paid on or before midnight of that day, and if paid before that hour, even after a loss, it will be sufficient.⁵ Where the premium falls due on Sunday it may be paid on the following day, — even after a loss also, — the rule appertaining to negotiable notes entitled to grace, that the payment must be made on the day preceding the last day of grace when that day happens on Sunday, not obtaining in other contracts, for reasons thus stated by the court in a case where the premium fell due on Sunday at noon : —

“ In reference to notes payable on a certain day but entitled to three days’ grace, it is said that in such case the note by its terms would be due and payable two days earlier than Saturday, and that what was originally a mere indulgence to casualty or oversight should not be extended, and therefore if the last of three days of grace falls on Sunday, the payment must be made on Saturday, and that it was more reasonable to take from than to add to a period of time thus originally allowed as mere grace and favor. But as to other contracts, which by the face of the instrument required a payment on a day which proves to be Sunday to discharge literally the promise or duty, the law seems to sanction the postponement

¹ See *ante*, §§ 127–145.

² See *ante*, § 134. See also *Wheeler v. Watertown Fire Ins. Co.* (Mass.), 10 Ins. L. J. 354, 355, where crediting the payment to the insured by the agent is held to be evidence of the completion of the contract.

³ [*Curtin v. Phoenix Ins. Co.*, 78 Cal. 619.]

⁴ [*Blackerby v. Continental Ins. Co.*, 83 Ky. 574.]

⁵ *Och v. Homestead, &c. Ins. Co.*, 21 Pitts. Leg. Jour. 98.

of the time for doing the same till the Monday following. In other words, Sunday is not a legal day for the performance of contracts and doing secular business. The statute law forbids all such acts. The party paying and the party receiving money on that day in discharge of a contract would subject themselves to a penalty for so doing. Sunday was not a day contemplated by the parties as embraced in the stipulation to pay a quarterly premium on the first day of October on each and every year during the life of the party assured. The defendants had no office open on that day, and were under no obligation to receive the payment of the premium on that day, if the same had been tendered by the assured. Such being the case, the assured was under no obligation to do what would have been not only an illegal act, but also one which the other party was not bound to recognize. In this view of the case there was no such default on the part of the assured in not paying the premium fully due on the first of October, as should be held to terminate the policy."¹ Payment within thirty days, on notice published five days consecutively in a newspaper, means payment within thirty days after the expiration of the five days.²

[§ 349 A. **Payment by Whom ; Lien for the Money.**—In general premiums voluntarily paid on the life of another cannot be recovered from the beneficiary, unless so agreed.³ When one who is not the sole beneficial owner pays premiums he is entitled to lien on the policy or its proceeds in the following cases : (1) By contract with the beneficiary. (2) By the right of trustees to indemnity out of trust property for money spent in its preservation. (3) By subrogation to this right of

¹ *Hammond v. The American Mut. Life Ins. Co.*, 10 Gray (Mass.), 306; *Taylor v. Germania Ins. Co.*, 2 Dill. C. Ct. (U. S.) 282; *Campbell v. The International Life Ass. Soc.*, 4 Bosw. (N. Y. Sup. Ct.) 298; *Howland v. Continental, &c. Ins. Co.*, 121 Mass. 499. This case contains an elaborate *résumé* of the history of the Sunday law, so called, well worthy of perusal. A note not entitled to grace falling due on Sunday is not payable till Monday. *Salter v. Bush*, 20 Wend. (N. Y.) 205. A premium note is entitled to grace. *Jarman v. St. Louis, &c. Ins. Co. (Tenn.)*, 5 Ins. L. J. 572.

² *Wetmore v. Mutual, &c. Ins. Ass.*, 23 La. Ann. 770.

³ [*Meier v. Meier*, 88 Mo. 566.]

some person who by request of the trustees had advanced money to preserve the property. (4) By the right of a mortgagee to add to his charge any money paid by him to preserve the property. In no other case can a lien be acquired either by a stranger or a part-owner.¹ And a trustee has as such no lien for premiums unless he is trustee of the very policy on which he pays them.² A contract to pay premiums and receive the amount out of the insurance money is good even as to a minor beneficiary, for though not binding on him as a contract, equity will compel him to do justice.³ Sometimes it is agreed that the mortgagee may insure and that the premiums shall be a lien under the mortgage, and such agreement is good.⁴ If a mortgagor of a policy neglects to pay the premiums the mortgagee may do so, and recover the amount with interest.⁵

[349 B. **Payment to Whom.** — The correspondence between certain brokers and the company is admissible to show that they were authorized to receive premiums for the company, and that payment to them was payment to the company.⁶ If a company delivers to one not already its agent a policy containing an acknowledgment of the payment of the premium, it makes such person its agent to receive the premium and deliver the policy.⁷ Where the insured paid the premium to B., a broker whom he had requested to get insurance for him, and B. obtained a policy through C., a correspondent of B.'s, but retained the premium until the monthly settlement between himself and C., it was held that the company was bound, although the policy was not to take effect until the actual cash payment of the premium. B. was regarded as the agent of the company in respect to holding the premium.⁸

¹ [Leslie v. French, 23 Ch. D. 552.]

² [*In re* Earl of Winchelsea's Policy Trusts, 39 Ch. D. 169.]

³ [Hodge v. Ellis, 76 Ga. 272.]

⁴ [Neale v. Albertson, 39 N. J. Eq. 382.]

⁵ Hodgson v. Hodgson, 2 Keen, 704 at 713; Overby v. Fayetteville B. & L. Life Ass., 81 N. C. 56.]

⁶ [Sun Mut. Ins. Co. v. Saginaw Barrel Co., 114 Ill. 99.]

⁷ [Lebanon Mut. Ins. Co. v. Erb, 112 Pa. St. 149.]

⁸ [Riley v. Commonwealth Mut. Fire Ins. Co., 110 Pa. St. 144.]

Payment of a premium to a broker through whom the policy is delivered, and who is apparently the agent of the company, is good although the policy declares that payment to any but the duly authorized agent of the company should be at the risk of the assured.¹ Where the policy provided that the premium must be paid to a duly appointed agent, that the by-laws should be part of the contract, and that no condition could be waived except in writing, a by-law requiring all agents to be appointed under seal is not one of those conditions, and may be waived by the act of the company in authorizing a person to act as its agent by a course of dealing recognizing him as such.² A clause in a policy making it necessary for it to be countersigned and delivered by the agent and the advance premium paid, does not give the agent authority to receive subsequent annual premiums after the day on which it was provided by the policy that they should be so paid in advance.³ Where the insured was postmaster (unknown to the company) and the company sent the premium note to the postmaster for collection, and he, ten days after it was due, tore up the note in the presence of witnesses and put the money in its place in the safe, and eight days after loss, which occurred the day following his witnessed payment, he enclosed the money to the company which did not know of the loss, it was held that his act in taking payment from himself after forfeiture was a fraud, and he could not recover.⁴

§ 350. **Non-payment of Premium ; Excuse ; Intervening War.** — But as the intervention of war cuts off all intercourse between the contracting parties, if they reside respectively with the belligerents, and neither by themselves or by their agents can lawfully have such intercourse, it has been generally held by the State courts, and in the inferior courts of the United States, that a failure to pay under such circumstances does not avoid the policy. One may undertake as against his

¹ [Greenwich Ins. Co. v. Union Dredging Co., 14 Daly, 237.]

² [Susquehanna Mut. Fire Ins. Co. v. Elkins, 124 Pa. St. 484.]

³ [Bouton v. American Mut. Life Ins. Co., 25 Conn. 542 at 555.]

⁴ [Harle v. Council Bluffs Ins. Co., 71 Iowa, 401.]

own acts and the acts of strangers, but not as against the acts of God,¹ his own government, or of the obligee.² And by the

¹ [See however, *School District v. Dauchy*, 25 Conn. 530 at 535, where it was held that the act of God will not excuse one from performing a contract he has entered into absolutely.]

² See the authorities cited, *ante*, §§ 36-42. And see also *Sands v. New York Life Ins. Co.*, 59 Barb. (N. Y.) 556, 557; s. c. affirmed in the Court of Appeals, 50 N. Y. 626, and *Cohen v. New York Life Ins. Co.*, id. 610, reversing s. c. in the Superior Court of the city of New York. The opinion was as follows:—

“A decision of this appeal has been delayed at the request of parties to other actions pending in this court, like in character in some respects to this, that before the questions involved should be decided their appeals might be heard.

“The importance of the questions at issue induced the court to listen to the request, and this case was substantially re-argued with *Sands v. The New York Life Insurance Company* in December last. The legal status of citizens of States of war, and the relation they mutually occupy, as well as the effect of a state of war upon contracts and obligations of the subjects of litigant States, and their right to contract or hold intercourse with each other, have recently been so frequently the subject of judicial discussion and decision in the State and Federal courts, that the leading principles by which the intercourse and dealing between enemies—that is, between the inhabitants of States and nations at war—are prohibited, or restricted and regulated, and the effect of war upon their mutual contracts and obligations, are quite familiar. They have been so often repeated in different forms, although in substance and effect the same, that a review of them, or a reference at much length to them, would be out of place.

“The general principles and doctrines as found in the treaties of nations upon public law, and deducible from the judgments of courts, are firmly established, and cannot be ignored or essentially modified by courts at this day. All that courts have to do is to apply the principles thus recognized and settled to cases as they are. It is said, in general terms, that in a state of war ‘the individuals who compose the belligerent States exist, as to each other, in a state of utter occlusion,’ and all intercourse between them is forbidden. Per Johnson, J., *The Rapid*, 8 Cranch (Supr. Ct.), 155. This proposition has been repeated with approval in several later cases. Judge Nelson, in the *Prize Cases*, 2 Black (U. S.), 635, 681, adopting the language of approved writers on international law, says that one of the legal consequences resulting from a state of war is that ‘the people of the two countries immediately became the enemies of each other; all intercourse, commercial or otherwise, between them, unlawful; and all contracts existing at the commencement of the war, suspended, and all made during its existence, utterly void. The insurance of enemies’ property, the drawing of bills of exchange or purchase on the enemies’ country, the remission of bills or money to it, are illegal and void; all existing partnerships between citizens or subjects of the two countries are dissolved; and, in fine, interdiction of trade and intercourse, direct or indirect, is absolute and complete by the mere force and effect of the war itself.’ See also *Jecker v. Montgomery*, 18 How. 110; *Hanger v. Abbott*, 6 Wall. 532; *The Ouachita Cotton*,

same courts it has been held that the contract is not dissolved, nor an established agency discontinued, by the war ;

id. 521 ; *Griswold v. Waddington*, 16 Johns. 438. These propositions, general and far-reaching as they are, were, however, made in cases relating to commercial intercourse, and involved the question as to the legality and effect of commercial dealings and transactions ; and the general language used in legal effects extends only to intercourse and dealings of that character, although all other intercourse clearly within the mischief intended to be avoided would be within the principle, and therefore within the rule itself.

"I do not understand that it has been authoritatively adjudged that all private contracts, without exception, made between citizens or subjects of States at war, are necessarily void, although the language of the court has been sufficiently comprehensive to include the proposition in its largest extent. The subject is elaborately and ably considered in *Kershaw v. Kelsey*, 100 Mass. 561 [*ante*, § 42], and the authorities, with the reason and extent of the rule under consideration, reviewed and discussed. The result of the examination was that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between these countries. This was regarded as including every act of voluntary submission to the enemy, or receiving his protection in any act or contract which tends to increase his resources, and every kind of trading or commercial dealing, or intercourse, direct or indirect. The action of Congress of July 13, 1861, 12 U. S. Statutes at Large, 257, and the proclamation of the President pursuant to that statute, only prohibited commercial intercourse between the citizens of the States declared to be in insurrection and the citizens of the rest of the States. For all the purposes of this action it may be assumed that the rule, thus restricted, would prohibit the making of a contract during a state of war, for the insurance of the life of an enemy.

"This was rather assumed by the counsel for both parties upon the argument. It would certainly forbid the transmission of money for a premium from one of the States at war to the other, and it is said that the life of an alien enemy cannot be insured by his creditor, although the latter be a subject of the same country with the insurer. *Bunyon's Life Assurance*, 19. The authorities cited to sustain this proposition were all, however, cases of insurance upon merchandise. *Harman v. Kingston*, 3 Camp. 150 ; *Potts v. Bell*, 8 T. R. 548 ; *Flindt v. Waters*, 15 East, 260, 266. The insurance upon the life of the husband of the plaintiff was a valid and lawful contract at the time it was made in 1849, and was for the term of his natural life, in consideration of a sum paid at the date of the policy, and further consideration of the annual payment of a like sum on or before the second day of April in every year. This was not a policy from year to year, but an insurance for life, subject to be defeated by the non-performance of the condition prescribed, to wit, the payment of the annual premium.

"It is expressly declared in the contract of insurance that if the annual payments should not be made, 'that said policy should cease and determine,' and 'that all previous payments made thereon should be forfeited to the company.' It was a life policy. *Hodsdon v. Guardian Life Ins. Co.*, 97 Mass. 144 ; *Ruse v. Mutual Ben Life Ins. Co.*, 26 Barb. 556 ; *New York Life Ins. Co. v. Clopton*, 7 Bush (Ky.), 179. The contract was not as to all its stipulations, and as to

that the insurers were bound to receive premiums, if properly tendered, and to maintain agencies at the places stipulated ;

both parties, executory. It was executed by the plaintiff by the payment of the annual premiums from 1849 to and including 1861, while it was wholly executory on the part of the defendant, its undertaking being to pay the amount specified upon the death of the insured. It is no answer to say that the plaintiff had only paid for the risk incurred from year to year. The annual premium paid during the first years of a life policy is in excess of the actual risk, and this excess is so much paid in advance for the greater risk during the later years in case of a prolonged life. The insurers would be greatly the gainers by avoiding all life policies on young lives after the payment of the annual premiums for ten or fifteen years, terminating the risk before the greater hazard of loss — the result of advanced age — has been incurred. The contract was a continuing one in the sense that it was to be performed in the future, but it was not a contract of continuance in its performance. The act to be performed by the defendant was a single act, the payment of a specified sum upon the happening of a certain event, and in this respect was like a covenant or promise to pay a sum of money at a day certain, or upon any condition lawful in itself. There is no pretence that a contract of the latter kind would be dissolved by war. The contract would remain, the remedy would be suspended. The act to be performed by the plaintiff was a single act to be performed at stated periods, and was not like the contract of partnership, and some other contracts which are continuous in their performance.

“In the case of a marine insurance, or a contract of affreightment, a war might act as a dissolution, and put an end to them. The first is upon enemies' property, and an insurance is in support of their commerce, and entirely inconsistent with the allegiance due to the government of the underwriter. As to such a contract, the authorities say the insurance terminates absolutely and at once by the very act of war, and the parties are in the same condition as if no contract was made; the one loses the premium, and the other his security against loss. But the rule will hardly apply to a life policy when large sums have been paid for premiums.

“There is nothing in the policy of the law, or the interest of the public, calling for an enforcement of the law of confiscation incident to a state of war, after the war has ceased, and the people of the two belligerent nations have again become one, solely for the benefit of one of two contracting parties, by the forfeiture of the rights of the other. This would be simply a confiscation of property after war had ceased, at the instance and for the benefit of individuals.

“By the payment of the annual premium in April, 1861, the life was insured until April, 1862; the engagement of the defendant was then lawful, and was to the effect that the company would pay the plaintiff five thousand dollars upon the death of her husband within the year. A promissory note in that form, made upon a good consideration, would be obligatory, and if the death occurs within the year, although after war had intervened, the right of action would be suspended during the war, but revived with the return of peace.

“There is no reason apparent why the promise to pay money upon the termination of a specified life should necessarily be terminated by the happening of war between the States of which the parties are respectively subjects, as unlaw-

that a tender by a citizen of one belligerent party to an agent located within the territory of that belligerent, whose appoint-

ful and inconsistent with the state of war, merely because it is called an insurance upon life. The policy in this instance protects the insurers and makes void the policy if the insured enter any military or naval service, or dies in the known violation of the laws of the United States, so that the risk was not increased by the state of war, nor the ability of the enemy to fill up the ranks of the army and navy affected by the insurance upon the life of its citizens.

“ Those insured would rather be deterred from taking up arms against the United States, lest their policies should be avoided.

“ Had the insured died at any time before April, 1862, I think there can be no doubt that the contract would have been regarded as one of those which, lawful when made and executed by the one party, are not dissolved, but merely suspended by the existence of war, and that a recovery could have been had at the close of the war.

“ The contracts between individuals of belligerent States are necessarily suspended during the war of the States, but are not annulled. *Phill. Int. Law*, 666; per Nelson, J., *Prize Cases*, *supra*. Mr. Wheaton says commercial partnerships are dissolved by the mere force and act of war, though as to other contracts it only suspends the remedy. *Wheat. Int. Law* (8th ed.), 408, § 317. This is upon the principle that the States, and not the individual, wage war. The question then remains whether the non-payment of the annual premiums during the years 1862, 1863, and 1864, involved a forfeiture of the policy and of all payments before then made. That such would be the effect of the non-performance of the condition, unless waived or legally excused, is not disputed, and unless the performance was waived by the defendant, or is legally excused by the existence of the war, the plaintiff must fail in her action and submit to the loss resulting from the forfeiture. It must be borne in mind that the war was the act of the States, and that individual citizens are not identified with their government so as to expose them to the rule of law, that he who by his own conduct prevents the fulfilment of a contract, or renders its performance impossible, shall not take advantage of a non-performance on the other side, or excuse the non-performance on his part. *Odlin v. Insurance Co. of Pennsylvania*, 2 Wash. C. C. R. 312; *Francis v. The Ocean Ins. Co.*, 6 Cow. 404; s. c. in error, 2 W. R. 64. The condition of affairs which made the payment of the premiums by the plaintiff during the years named unlawful, and therefore impossible, was not created by the act or default of the plaintiff, but resulted from the acts of the governments of which the respective parties were subjects. There is a manifest distinction between mere impediments and difficulties in the way of the performance of a condition, and an impossibility created by law or the act of the government. This is clearly recognized in *Wood v. Edwards*, 19 J. R. 205, and *People v. Bartlett*, 3 Hill, 570. An individual by his covenant may undertake, as against his own acts and the acts of strangers, but not against the acts of God or of his government, or of the obligee. See per Nelson, C. J., *People v. Bartlett*, *supra*. In *Wolfe v. Howes*, 20 N. Y. 197, the performance of the undertaking became impossible by the act of God in the death of the party, and performance was held excused upon the ground that the parties must be deemed to have made this an exception by implication. So, too, a party is excused from the perform-

ment had not been revoked, was lawful; that the agent was bound to receive it without conditions, and to hold it for his

ance of his covenant when the performance is made unlawful by act of Parliament. If made absolutely unlawful, it operates to repeal the covenant; if only temporarily unlawful, it suspends the operation. *Brewster v. Kitchin*, 1 Ld. Raym. 317. Lord Alvanley, C. J., in *Touteng v. Hubbard*, 3 B. & P. 291, says: 'But when the policy of the State intervenes and prevents the performance of the contract, the party will be excused.' That which will avoid a covenant will nullify a condition, and *vice versa*. *Platt on Cov.* 569; *Doughty v. Neal*, 1 Saund. 211, 214, n. (2). The policy of the law is to mitigate the severity of wars, and relieve citizens, so far as consistent with the interest of the government, from the hardships incident to it, and, *a fortiori*, the stringent and severe rule invoked by the defendant should not be applied in a doubtful case so as to produce extreme hardship, when, by adopting a milder and more equitable rule, each of the contracting parties will secure equal and exact justice, and all their legal and equitable rights. The operation of the Statute of Limitations is held to be suspended during the war by reason of the inability to enforce the claim, and this is in harmony with the benign tendency of the age, the result of advanced civilization. *Hanger v. Abbott*, 6 Wall. 532. Judge Clifford says: 'Neither laches nor fraud can be imputed in such a case.' At the time of making the contract in this case, the plaintiff had the legal right and ability to make the annual payments, but the effect of the war was to make the attempt unlawful, without any fault on her part. The operation of a condition as express and absolute as in this case, was held suspended during the war, in *Semmes v. Hartford Ins. Company*, 13 Wall. 158. The condition there, as here, was by the act and agreement of the party, and yet, its performance being impossible, it was held to be inoperative, and the time for bringing the action extended, notwithstanding the agreement of the parties, by the mere act and effect of the war. It was held that the disability to sue imposed on the plaintiff by the war relieved him from the consequences of failing to make the annual payments by the day. She was guilty of no laches, and why subject her to a forfeiture? No injustice is done the defendant in this case by permitting the plaintiff to make now the payments which she could not lawfully make between 1861 and 1865.

"The interest will compensate for the non-payment at the time, and the defendant in legal contemplation will be precisely in the situation it would have been had the money been paid on the law-day. *Manhattan Life Ins. Co. v. Warwick*, 20 Grat. 614; *New York Life Ins. Co. v. Clopton*, 7 Bush (Ky.), 179; *Hamilton v. The Mut. Life Ins. Co.*, 9 Blatch. 234; *ante*, § 39.

"The reasonings of the prevailing opinions in these cases abundantly sustain the judgments. The case comes before us on demurrer to the complaint, and if there are any equities, or any facts or circumstances which would deprive the plaintiff of the rights to which the case made by the complaint entitled her, the defendant may set them up by answer.

"It was also claimed that the defendant, being a mutual company, of which all holders of policies were members, it was a partnership which was dissolved by the war. Trading and commercial partnerships, and perhaps all partnerships, are dissolved by war between the States of the several partners. But whatever analogies there may be between mutual companies and ordinary partnerships,

principals, who were domiciled within the territory of the other belligerent. And where the agency was not during the war continued by the insurers, the insured might, after the war, without tender of overdue premiums, recover damages as for a breach of the contract, if the insurers denied the validity of the policy.¹

§ 350 *a*. **Intervening War.** — On the other hand, it has been held, in opposition to the general doctrine of the cases cited in the preceding section, and in a very able, learned, and elaborate opinion, in which many of these cases were considered and criticised, that the war abrogated all such contracts of insurance from the moment when the parties thereto became

and the relation of the members of the two organizations, an incorporated company, although organized upon the mutual principle, is in no proper or legal sense a partnership. The defendant is a body politic and corporate, capable of contracting, and of suing and being sued, and the relation between the plaintiff and the corporation is that of insured and insurer, and the rights and duties of the contracting parties are to be governed and determined by the terms of the policy by which the insurance is effected as in other cases. Other and incidental rights are secured to the plaintiff, as a member of the company and one of the corporators; but this does not make the members partners as between themselves, or affect the express contract of the corporation. If it was a partnership, as claimed, and dissolved by the war, the plaintiff has not forfeited her share in the assets of the copartnership, but is entitled to an accounting as of the day of the dissolution, and to her due proportion of the property and assets. This would lead to a result not desired by the defendant."

¹ *Hancock v. New York Life Ins. Co.*, C. Ct. (Va.), 4 Big. Life & Acc. Ins. Cas. 488. The amount received in this case seems to have been the amount of premiums which had been paid with interest. See also *New York Life Ins. Co. v. White* (Va.), 2 Ins. L. J. 917; *New York Life Ins. Co. v. Hendren*, 24 Grat. 536; *Smith v. Charter Oak, &c. Ins. Co.*, C. Ct. St. Louis County (Mo.), 5 Big. Life & Acc. Ins. Cas. 212; s. c. 1 Cent. L. J. 76, and note; *Martine v. International Life Ins. Co.*, 53 N. Y. 339. In this case the premiums were payable by a citizen of North Carolina through an agency at Fayetteville in that State, to the New York general agency, controlled by a directory of a British insurance company. The insured having died during the war, several premiums being actually unpaid, and no agency of the insurers being kept up in North Carolina during the war, recovery was had for the amount of insurance less the amount of unpaid premiums. [The civil war preventing the payment of premiums excuses the failure, and the insured will be reinstated by equity on offer to pay up the premiums after the war. *Bird v. Insurance Co.*, 11 Phila. 485 and C. Ct. U. S.], 5 Big. Life & Acc. Ins. Cas. 487; *Connecticut, &c. Ins. Co. v. Duerson* (Va.), 6 Ins. L. J. 670; *Crawford v. Ætna Life Ins. Co.* (Tenn.), 6 Ins. L. J. 685.

public enemies, so that neither could maintain any action against the other.¹ Following this case came also the very elaborate case of *Worthington v. Charter Oak Insurance Company*,² where the court came to the same conclusion. And, finally, the Supreme Court of the United States, after affirming by an equally divided court the opposite decisions in *Hamilton* and *Tait's* cases, and upon grounds not altogether consistent with those upon which the court based its decision in *Worthington's* case, has now so far adopted the doctrine of the latter case as to hold that a policy of life insurance forfeitable on non-payment of any annual premium is not an insurance from year to year, like a common fire policy, but that the premiums constitute an annuity, the whole of which is the consideration for the entire insurance for life, and the condition is a condition subsequent making void the policy by its non-performance; that the time of payment in such policies is material, and of the essence of the contract, failure wherein involves a forfeiture which equity cannot relieve against; and that if war intervenes, and makes intercourse between the parties unlawful, the policy is nevertheless forfeited if the insurers insist upon it, in which case, however, the insured is entitled to recover the difference between the cost of a new policy and the present value of the premiums yet to be paid on the old policy at the time the forfeiture occurred,—being the equitable value of the policy arising out of the premiums actually paid. It was also held that it would be inequitable to compel a revival of the policies subverted by the war, as none but the sick or wounded would probably elect to have them revived.³

¹ *Emmons, J., Tait v. N. York Life Ins. Co., C. Ct. (Tenn.), 2 Ins. L. J. 863; s. c. 4 Big. Life & Acc. Ins. Cas. 479.*

² 41 Conn. 372. See also *Dillard v. Manhattan, &c. Insurance Company*, 44 Ga. 119.

³ *New York Life Ins. Co. v. Statham*, 93 U. S. 24. This case holds that a policy for life is a contract from year to year, terminable at the expiration of any year at the option of the insured, contrary to the view taken by the New York Court of Appeals, which regards it as a continuous contract for life. *Homer v. Guardian, &c. Ins. Co.*, 67 N. Y. 478. See also upon this last point, as well as upon the whole subject, 11 Am. Law Rev. 221, article by Ex-Judge Foster, of the Massachusetts Supreme Judicial Court.

§ 351. And as the right, under such circumstances, to keep alive the policy by the payment of overdue premiums remains in the insured, so the insurers may demand and compel payment of the same.¹

§ 352. **Payment of Premium; Excuse; Intervening Death.** — The payment of the premium on or before the day specified in a policy from year to year is a condition precedent, and its non-payment from year to year as it becomes due works a forfeiture of the policy; and the fact that the insured is stricken with paralysis or insanity before payment, even though he may be on his way to the office to pay his annual premium, does not excuse the non-payment or save the policy. This was not the intervention of an act of God in such sense as to be the foundation of an excuse.² The payment of the premium is an act which can be performed by others than the insured, and does not depend upon the continued capacity of the insured. In point of fact, a man may be mentally and morally, and even physically, incapable for years of existence, yet the premiums may be paid by his friends or relatives, or those interested in his case. And so they often are. The act required is not necessarily a personal act,³ but may be performed as well by others; and the failure therefore of the insured to perform it personally does not show that the act could not have been performed.⁴ The insurers are not liable unless the death occur within the time covered by the policy.⁵

[§ 352 A. **Invalid Excuses.** — Where a policy provides that it shall be forfeit if the premium is not paid *ad diem*, or the

¹ Lynchburg Hose Fire Ins. Co. v. Knox, Sup. Ct. City of Baltimore, *ante*, § 41.

² [Delirious sickness rendering it impossible for the assured to attend to the payment of premiums is not such an act of God as will excuse the default. *Carpenter v. Centennial Mut. Life Ass.*, 68 Iowa, 453.]

³ As to the point that the act is a personal one, see *Worden v. Guardian, &c. Ins. Co.*, 39 N. Y. Sup. Ct. 317.

⁴ *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. (Ct. of App.) 277; *Wheeler v. Conn. Life Ins. Co.* (N. Y.), 11 Repr. 643; *Evans v. United States Life Ins. Co.*, 64 N. Y. 304; *ante*, § 335. See also dissenting opinion of Runyon, Ch., in *Hillyard v. Mutual Ben. Life Ins. Co.*, 35 N. J. 415, and *post*, § 465; *Broom's Legal Maxims* (6th Am. ed.), 176.

⁵ *Lockyer v. Offley*, 1 T. R. 252, 260.

note given therefor is not paid at maturity, neither sickness and incapacity of the insured, nor a failure on the part of the company to conform to its usage of giving notice of the day of payment, will constitute a good excuse. The company usually gives notice to designate the agent to whom payment shall be made and to stimulate the memory of the insured, but it is under no obligation to give such notice. Prompt payment is the life and soul of the insurance business, and time is material to the contract. A custom not to demand punctual payment of premium notes is a mere matter of indulgence and begets no legal right to its continuance.¹ While the company continues to do business in the ordinary way, a belief that it is insolvent is no excuse for not paying premiums.² Although the agent of assured calls several times at the insurance office on the day the premium is due, and fails to find the agent, the policy is still void for non-payment.³ An assurance by the agent that the dividends will pay the premiums, is not a ground of relief against the obligation to pay premiums.⁴ It is no answer to a defence of non-payment that the assured agreed with the agent that the latter should credit the premium on a debt he owed the assured, or that the agent agreed to give notice to a voluntary assignee of the insured when the premium was due. Such assignee is a stranger to the contract of the company.⁵ The death of the local agent is no excuse for not paying premiums that by the terms of the policy are payable at the home office.⁶

§ 353. **Days of Grace ; Payment of Premium after Death of the Insured.**—And upon the point suggested by Hunt, J.,⁷ that such a payment can only inure to keep the policy alive

¹ [Thompson v. Insurance Co., 104 U. S. 252, 258-259 (1881); New York Life Ins. Co. v. Statham, 93 U. S. 24; Insurance Co. v. Eggleston, 96 U. S. 572.]

² [Taylor v. Charter Oak Life Ins. Co., 9 Daly, 489; 8 Abb. U. C. 331.]

³ [Cronkrite v. Accident Ins. Co., 35 Fed. Rep. 26 (Col.), 1888.]

⁴ [Hale v. Continental Life Ins. Co., 12 Fed. Rep. 359; 20 Blatch. 515.]

⁵ [Lycoming Fire Ins. Co. v. Storrs, 97 Pa. St. 354.]

⁶ [Bulger v. Washington Life Ins. Co., 63 Ga. 328.]

⁷ *Ante*, § 346. [An overdue premium paid after death of the insured, both parties being ignorant of the fact, has no effect. *Miller v. Union Central Life Ins. Co.*, 110 Ill. 102.]

when the subject of insurance is alive at the time of payment, the case of *Pritchard v. Merchants' and Tradesmen's Mutual Life Assurance Society*¹ has an important bearing. In that case there was a condition that the policy should be void "if the premiums were not paid within thirty days after they should become due, but that the policy might be revived within three calendar months, on satisfactory proof of the health of the party on whose life the insurance was made." The insured died before the expiration of the thirty days, and the premium was forwarded and received the day after the expiration of the thirty days, both parties being ignorant of the fact of the death. Said Gray, for the insured; *arguendo*: "The receipt of the premium after the expiration of the thirty days does not operate the creation of a new policy, but is a mere waiver of a forfeiture, and an adoption of the payment as if made in due time. The distinction, therefore, of 'lost or not lost,' has no bearing on this case." Willes, J.: "You say that the payment on November 15 had retrospective effect. Is not that contradictory to the terms of the receipt, which is stated to be for a 'renewal' of the policy, pointing to the future?" Gray: "It is the ordinary form of receipt in use; the same that would have been given if the payment had taken place within the thirty days, and in the lifetime of the party." Crowder, J.: "Would an original policy have been good, the party being dead at the time the assurance was effected? Would not that be within the case of *Contourier v. Hastie*?² Was not this a receipt of money in ignorance of facts, which, if known, would have prevented the parties from accepting the payment?"³ Gray: "This is not like the case of an action to recover back money which has been paid under a mistake of fact. If a man enters into a contract under a mistake, that mistake will not absolve him from the performance of his con-

¹ 3 C. B. N. s. 622.

² 5 House of Lords Cases, 673.

³ This was the case in *Lefavour v. Insurance Co.*, 1 Phila. 558, where a policy was held void which was issued after, although dated prior to, the death, the insurers being ignorant of the fact, and the insured knowing it. But if both parties were ignorant, it has been said the policy issued is valid. *Forbes v. Ed. Life Ass. Co.*, 10 Ct. of Sess. Cas., 1st ser., 451.

tract. Here the payment was to cover the risk from October 13, 1855, to October 13, 1856." Crowder, J.: "But the man was dead when the transaction took place." The counsel for the plaintiff was stopped by the court. Williams, J., in giving his opinion, said:—

"Taking the policy without the conditions, it is clear that the plaintiff would have no claim whatever against the company thereon after the 13th of October, 1854, unless he duly paid the premium for each ensuing year, on or before that day. Then comes a condition (the second) which provides that the policy shall become void if the (yearly) premiums be not paid within thirty days after they become due respectively. Stopping there, it might be a question, and it is one which persons insured would be wise not to raise, whether this does not contemplate a payment by the assured himself, or whether, as has been contended on the part of the plaintiff, the effect of this condition is to absolutely extend the period for the payment of the premium, so that, if the assured should die within the thirty days, the company are still bound to accept the money; such payment to all intents and purposes insuring as a payment within the time limited by the policy, so as to entitle the representatives of the assured to recover upon the policy, even though the assured should be dead at the time the premium was paid. The inclination of my opinion, if it be necessary to express one, and perhaps it is, for it has an important bearing on the case, is, that the thirty days are given only with reference to insurance for future years, and that, notwithstanding the life has become less valuable, the company are bound to go on insuring future years, provided the future premiums are paid within thirty days after the expiration of each period of insurance.¹ However that may be, the payment here was not made within the thirty days. But then comes this further condition: 'But this policy may be revived within three calendar

¹ In *Worden v. Guardian, &c. Ins. Co.*, 39 Superior Ct. (N. Y.), it was held, under a policy providing that the "premium should be paid," that it might be paid within the days of grace, after the death of the insured, by another than the insured; distinguishing the case from those where the policy provides that the assured shall pay, and use language implying that he is still alive. See *Want v. Blunt*, *post*, § 357.

months, *on satisfactory proof of the health of the party on whose life the assurance is made*, and the payment of a fine of 2s. 6d. per cent upon the sum assured,' &c. I am at a loss to see how that provision aids the plaintiff's case. It assumes that the subject upon which the insurance is to attach is a living person, otherwise the stipulation for satisfactory proof of health would be idle and absurd. The very foundation of a life policy is, that it is a contract for the payment of a certain sum on the future death of a person in being, in consideration of the present payment of a premium. The renewals, like the original policy, clearly are only for the future assurance of a living person. Then it is said, that, by accepting the premium after the expiration of the thirty days, the directors must be taken to have waived the giving of proof of the health of the party on whose life the assurance was made, and that the payment inured as a payment made in due time, and that the policy was thereby revived. Taking that literally, it is, that the directors waived the production of proof of the state of health of a man who was supposed to be alive, not the *fact* of his being alive. They cannot be assumed to have waived the condition that the person whose life was insured should really be a living person at the time the renewal or revival of the policy took place. Then it is said that the payment and acceptance of the premium created a new contract. But in truth it is no new contract at all; it was intended as a payment under the original contract. The result is, that the policy was not renewed, and our judgment must be for the defendants."

Byles, J.: "I also think that the defendants are entitled to judgment. An important question is glanced at here, namely, as to the effect of a payment of the premium on a life policy after the expiration of the period covered by the policy, and within the number of days usually allowed by the conditions for making the payment, or, as they have been called, the days of grace. I am not aware of any authority upon that subject except what fell from the court in the recent case of *Simpson v. The Accidental Death Company*.¹ It is unneces-

¹ 2 C. B. N. S. 257.

sary on the present occasion to pronounce any opinion upon that question. It may be observed that, whatever might have been the construction of the policy if it had been utterly silent in this respect, here it is in terms a contract or undertaking against the happening of a future event. 'Dead or alive' — which would be equivalent to 'lost or not lost' in a marine policy — seems to be excluded by the terms of the policy and the third condition. But the objection that the payment did not take place within the thirty days, clearly appears to me to be fatal to the plaintiff's claim. The payment and receipt were *ultra* the condition and under a mistake. The effect would be that the plaintiff might maintain an action to recover back the premium so paid, on the ground of its having been paid and received under a mistake of facts."

§ 354. **Days of Grace ; Payment of Premium after Death.** — The case of *Simpson v. Accidental Death Insurance Company*, referred to in the last section, was this. The insured took out a policy against death by accident, the premium upon which was payable on the twenty-second day of January, annually. One of the conditions provided that the premiums should be paid "within twenty-one days from the day on which the same should accrue or become due," and that, "provided the same should be from time to time paid within such space of twenty-one days, the policy should not be void, notwithstanding the happening before the expiration of such space of twenty-one days of the event, upon the happening whereof the amount secured by the policy should, according to the terms hereof, become payable." Another condition provided that "if the premium should be unpaid for twenty-one days next after it should become due, the policy should be absolutely void." And it was also provided in another condition that "in every case where a new premium should become payable, the directors should be at liberty to terminate the risk by refusing to accept the premium." The insured was killed by accident on the 1st of February, the premium due on the 22d of January preceding not having been paid nor tendered, nor was it afterwards until after the expiration

of the twenty-one days. Upon these facts it was held that the premium was to be paid by the insured and not by his executor, and that if the latter had tendered it within the twenty-one days, it would, if not accepted, have been of no avail; that the non-payment within the time limited rendered the policy void; and that under the terms of the last condition neither the executor nor the assured, had he been living, would have had an absolute right to keep the policy alive by the payment or tender of the premium within the twenty-one days, as the insurers had reserved the option to continue or to refuse to continue, at their discretion.¹

§ 355. **Days of Grace; Payment of Premium after Death; Prospectus.** — And to the same effect is *Mutual Benefit Life Insurance Company v. Ruse*,² where the policy was to be void if the annual premiums were not paid on or before a specified day of each year. But the company issued a prospectus, not referred to in the policy, stating, among other things, that any one neglecting to pay his premium for thirty days after the same became due, forfeited his insurance. The premium was not paid on the day specified, but was tendered before the expiration of thirty days, though not till after the death of the insured, and refused. The question was whether the prospectus was admissible in evidence to control the provisions of the policy and to extend the time of payment of the premium for thirty days. And the court held the prospectus inadmissible, and also if it were admissible, that it could not have the effect of reviving a policy where the insured had died before the payment of the premium within the thirty days. “If,” said the court, “a tender of the premium had been made in this case after the day of payment named in the policy, and before the expiration of thirty days, *the insured being in life*, I should incline to the opinion that they would have been bound by it; but if made within the thirty days, the insured being dead, and the fact of his death known to the parties, there would be in that event no contract, no consideration for the

¹ *Robert v. New England, &c. Ins. Co.* 1 Disney (Supr. Ct., Cincinnati), 355.

² 8 Ga. 534. See also *Day v. Mut. Ben. Life Ins. Co.*, 1 McArthur (D. C.), 41; 3 Ins. L. J. 253; s. c. 4 Big. Life & Acc. Ins. Cas. 15.

insurance, no mutuality. It would be an act of *mère* futility, out of which no liability could spring. . . . There can be no valid contract for the insurance of the life of a dead man." And upon the same facts the Court of Appeals of New York¹ came to the same conclusion, reversing the decision in the same case in the court below.²

§ 356. **Non-payment of Premium; Excuse; Prospectus; Custom; Notice.**—Afterwards, however, upon a motion for a rehearing, and upon the citation of three English cases,³ the court observed that the cases referred to did certainly hold that the prospectus might equitably be regarded as forming a part of and controlling the terms of the contract, and that it was not improbable that an examination of these cases would have led to a different conclusion than the one arrived at upon that point; but as the judgment was right upon another ground, it would not disturb it.⁴ The first two of the English cases referred to held that a prospectus issued by the company, contemporaneously with the policy, stating that these policies are indisputable except upon the ground of fraud, estop the companies from setting up the defence of a misrepresentation, unless it be alleged that it was fraudulent as well as false. The last case⁵ merely holds that equity will reform a policy not made out according to the agreement of the parties. But a still later English case than any of the three before cited⁶ holds that a party interested may avail

¹ *Ruse v. Mut. Ben. Life Ins. Co.*, 23 N. Y. 516.

² 26 Barb. (N. Y.) 556. There seems to be some confusion about the facts. In the report of the case in the Supreme Court, it is stated by the judge who gave the opinion that the tender of the premium was before the death,—a fact which, if true, would doubtless justify that decision. But the opinion in the Court of Appeals, as well as the same case in Georgia, shows that the tender was not till after the death of the insured. In neither case, however, do the court seem to lay much stress on the fact of the time of payment. See also *Smith v. Continental, &c. Ins. Co.*, Dist. Ct. (Phila.), 3 Ins. L. J. 63, which, however, is contrary to the cases cited *ante*, § 344 *a*.

³ *Wood v. Dwaris*, 11 Exch. 493; *Wheelton v. Hardisty*, 8 E. & B. 282; *Collett v. Morrison*, 9 Hare, 162, 173.

⁴ 24 N. Y. 633.

⁵ *Collett v. Morrison*, the earliest in date.

⁶ *Central Railway Co. v. Kisch*, 2 H. L. Cas. 99. See also *Walsh v. Ætna*

himself of the statements contained in such a prospectus to relieve himself from the obligations of a contract which he has entered into, and to which the prospectus refers. In *Salvin v. James*,¹ it seems to have been taken for granted that such a prospectus was to be deemed a part of the contract. In the opinion of Lord Campbell,² a statement in the prospectus of a company that all policies will be indisputable except for fraud, waives all forfeitures except for personal fraud on the part of the insured. The fraud of third parties does not avoid such a policy, and it is as if the statement were broadly that all policies were indisputable; since the law would interpose to protect the insurers against the personal fraud of the insured. Where the policy had lapsed for non-payment of premium within the usual days of grace, and the company wrote to the insured that they would reinstate if he would pay the overdue premium and furnish a certificate, and this was done within eight days, the court sustained a bill in equity to declare the policy reinstated, no good reason being shown why the certificate should not be accepted, and holding that a certificate must be satisfactory which ought to be satisfactory.³ It seems, also, that in cases of improper refusal to accept premiums the insured may elect to treat the policy as void, and sue for damages, or he may wait till the policy becomes payable by its terms, and then avoid a forfeiture by plea of tender of payment; but he cannot recover the premiums paid, and leave the question of liability on the policy open.⁴ No notice is required from the insurer to the insured that his premium, or note given for a premium, is about to become due, unless the custom and course of dealing between them has been such as to justify the insured in the belief that

Life Ins. Co., 30 Iowa, 133; *Rohrschneider v. Knickerbocker, &c. Ins. Co.* (N.Y.), 8 Ins. L. J. 392.

¹ 6 East, 571.

² *Wheelton v. Hardisty*, 8 E. & B. 232, 282. And such waiver is as good a plea at law as in equity. *Robinson v. St. Louis, &c. Ins. Co.*, C. Ct. (Mo.), 8 Ins. L. J. 159.

³ *Miesell v. Globe Mut. Ins. Co.*, 76 N. Y. 115.

⁴ *Day v. Conn. Gen. Life Ins. Co.*, 45 Conn. 480. See also *post*, § 568; *Hight v. Continental, &c. Ins. Co.*, C. Ct. (Ind.), 10 Ins. L. J. 223.

such notice would be given, and induce him to rely upon it to his prejudice;¹ or unless such notice is necessary to inform the insured of the amount which is to become due,—that amount being variable, and depending upon conditions known only to the insurer.²

[§ 356 A. **Notice of the Time of Payment.**—In regard to the effect of a habit or usage of sending notice of the date when each premium becomes due, opinions differ. On the one hand it is held that where from the course of dealing between the parties the insured has a right to believe that notice will be given to him of the amount due and the time it is to be paid, the company cannot in the absence of such notice set up the failure to pay.³ Usage makes the giving of notice a part of the contract.⁴ If where there is a usage to give notice none is sent, payment of the premium within a reasonable time will save forfeiture.⁵ A notice that a premium will fall due, which does not state that in default of payment the policy will “become forfeited and void,” is not sufficient under the New York act of 1877, ch. 321, requiring notice of a given form, although the notice states that “prompt payment is necessary to keep your policy in force.”⁶ This law

¹ *Robert v. New England, &c. Ins. Co.*, 1 Disney (Supr. Ct. Cincinnati), 355; *Thompson v. Knickerbocker, &c. Ins. Co.*, C. Ct. (Ala.), 5 Big. Life & Acc. Ins. Cas. 8; *post*, § 361; *Lewis v. Phoenix Mut. Life Ins. Co.*, 44 Conn. 72; *Union, &c. Ins. Co. v. Pottker*, 33 Ohio St. 459; *Wehrlin v. Phenix Ins. Co.*, 1 So. L. Rev. N. S. 337; *Girard Life Ins. Co. v. Mutual, &c. Ins. Co. (Pa.)*, 10 Ins. L. J. 257; *McLean v. Piedmont, &c. Ins. Co. (Va.)*, 7 Ins. L. J. 380. So in France, where the custom is to send out agents to collect annual premiums from the parties insured, they may rely upon this custom, and are not in default till demand, though the policy provides that premiums shall be paid at the office of the insurer. *L'Aigle c. Aubry*, Dalloz, Jur. Gén., 1870, 2, 163; *Comp. de l'Union c. Fouvre*, id. 1850, 240; id. 5, 34. See also *Mayer v. Mut. Life Ins. Co.*, 38 Iowa, 304; *ante*, § 346.

² *Home Life Ins. Co. v. Pierce*, 75 Ill. 426.

³ [*Attorney-General v. Continental Life Ins. Co.*, 33 Hun, 138; *Manhattan Life Ins. Co. v. Smith*, 44 Ohio St. 156.]

⁴ [*Grant v. Ala. Gold Life Ins. Co.*, 76 Ga. 575.]

⁵ [*Grant v. Ala. Gold Life Ins. Co.*, 76 Ga. 583, disagreeing with the views expressed in *Thompson v. Insurance Co.*, 104 U. S. 252, though not with the decision, for in that case the premium was never paid or tendered.]

⁶ [*Phelan v. Northwestern Mut. Life Ins. Co.*, 113 N. Y. 147.]

applies to policies issued before it was passed.¹ The burden of proof is on the company to show that it has served on the insured the notice of forfeiture for non-payment of premium required by the New York laws.² A failure of notice to pay a premium to reach the assured does not prevent the avoidance of the policy, if the notice was properly mailed and directed.³ So under the Iowa statute, requiring notice to be given to the makers of premium notes when they fall due, the service is complete on mailing a registered letter, or at least when it should be received in due course of mail.⁴ In Pennsylvania it is held that a custom to notify when premiums become due is inadmissible, unless it is also shown that the notice was omitted in the particular case on purpose to avoid the policy.⁵ A company in the habit of sending notice of the due-ness of premiums is not obliged to continue the practice.⁶ If there is nothing in the charter or by-laws requiring the company to send notice of the time when the annual interest becomes due, a mere usage to do so creates no right to receive such notice.⁷ A requirement in the notice that the premium shall be paid by noon may be waived by a previous course of dealing in regard to such notices.⁸

§ 357. **Payment of Premium ; Days of Grace ; Cy pres Performance.** — In an early case, when policies of insurance were usually under seal, an attempt was made to introduce the doctrine of *cy pres* into the interpretation of these contracts, in analogy to the rule as to the interpretation of conditions respecting real estate, claiming that such conditions need not be strictly performed according to the letter, but it is enough if they be performed as near as may be and according to the

¹ [Carter v. Brooklyn Life Ins. Co., 110 N. Y. 15.]

² [Baxter v. Brooklyn Life Ins. Co., 44 Hun, 184; Laws of 1876, c. 341; Laws of 1877, c. 321; Wyman v. Phoenix Mut. Life Ins. Co., 45 Hun, 184.]

³ [Lothrop v. Greenfield Stock & Mut. Fire Ins. Co., 2 Allen, 82 at 85.]

⁴ [McKenna v. State Ins. Co., 73 Iowa, 453.]

⁵ [Girard Life Ins., &c. Co. v. Mutual Life Ins. Co., 97 Pa. St. 15.]

⁶ [Smith v. National Life Ins. Co., 103 Pa. St. 177.]

⁷ [Mutual Fire Ins. Co. v. Miller Lodge, 58 Md. 463; Webb v. Mut. Fire Ins. Co., 63 Md. 213.]

⁸ [Ala. Gold Life Ins. Co. v. Garmany, 74 Ga. 51.]

intent. The case was one where a party for the benefit of his wife, in consideration of quarterly payments to be made by him during his life, stipulated for the payment of an annuity to his wife from and after his decease during her life. The insurers covenanted to pay such annuity on condition that the assured should pay, in addition to the quarterly premium, the proportion of contributions which the members of the society should, during his life, be called on to make; and by the rules of the society, if any member should neglect to pay the quarterly premiums for fifteen days after they respectively become due, the policy should be void, *unless the member, continuing in as good health as when the policy expired, should pay up the arrears within six months.* The member died, leaving a quarterly payment due and unpaid at the time of his death, and his executor tendered the amount due within fifteen days after it became due. But the court, after referring to the authorities in favor of such a construction of conditions annexed to real estate, and to the argument of the plaintiff that the payment of the premium in these cases was analogous to a condition to create an estate, declared that the analogy did not hold good, and that the rules applicable to conditions with respect to real estate did not apply, and that this being a contract of insurance must be construed according to the intent of the parties expressed in the deed or policy. The executor's tender of the amount due within fifteen days after it became due, the insured not being then a member continuing in as good health as when the policy expired, did not revive the policy.¹ And in *Tarleton v. Stanforth*,² in a case of fire insurance where the premium was tendered within the fifteen days' grace allowed, but not till after the loss, it was upon the same principle held that the tender would not revive the policy. In this case the insur-

¹ *Want v. Blunt*, 12 East, 183; *Donnald v. Pied., &c. Life Ins. Co.*, Sup. Ct. of South Carolina, 4 S. C. 321. In this case the condition was "that no premium should be received after the day named in the policy, unless the insured should be in perfect health, and that the risk should continue at the entire option of the company." And see *ante*, § 354.

² 5 T. R. 695; affirmed in the Exch. 1 B. & P. 470.

ance was from half-year to half-year, "as long as the insurers should agree to accept the same" within fifteen days after the expiration of the former half-year; but there was to be no insurance till the premium was actually paid.¹ In *McDonnell v. Carr*,² however, where the policy was renewable from year to year, at the discretion of the insurers, but provided that "no policy will be considered valid for more than fifteen days after the expiration of the period limited therein," unless the premium be paid, it was held that the insurers were liable for a loss occurring after the expiration of the year, and before payment of the premium within fifteen days, as the contract was in effect an insurance for a year and fifteen days.

§ 358. **Non-payment of Premium ; Excuse ; Insolvency of Insurers ; Policy declared forfeited ; Extension of Time ; Change of Agency ; Course of Business ; Suspension of Policy.**—The non-payment of a premium falling due after an order issued, upon the petition of the insurers, to wind up the affairs of the insurance company, does not work a forfeiture of the rights of the insured against the company.³ This is practically a determination of the contract by them, and not by the policyholder. He therefore need take no further steps to keep his policy alive, but may prove his claim for damages, as of the day when the order to wind up took effect.⁴ And the measure of damages in such case is the sum which an insurance company charging the same rate of premium will require to continue the policy.⁵ But it is no excuse for non-payment of premium that the insurance company is under an injunction

¹ See also *Salvin v. James*, 6 East, 571.

² *Hayes & Jones (Irish)*, 256.

³ [Non-payment of a premium coming due after the company has become insolvent, does not avoid the policy. *Jones v. Life Ass.*, 83 Ky. 75. One who relies upon the insolvency of the company as an excuse for not paying his premiums, must show his readiness to perform had the company not been insolvent, and also that the company has been actually suspended either by some act of its own, or by a proceeding instituted for the purpose. *People v. Globe Mut. Life Ins. Co.*, 32 Hun, 147.]

⁴ *Re Albert Life Ins. Co.*, 22 Law Times, n. s. (James, V. C.) 92; s. c. Law Rep. 9 Eq. 706; *U. S. Fire & Mar. Ins. Co. v. Tardy (Ala.)*, 2 Ins. L. J. 673.

⁵ *Re Albert Life Ins. Co.*, 22 Law Times, n. s. 697; Law Rep 9 Eq. 706.

from doing business pending an inquiry into its solvency.¹ [When a foreign company has ceased to do business in the place specified for the payment, a failure to pay on the day named will not be fatal.² Policy-holders are not obliged to pay premiums after the company discontinues business. Nor are they required to go over to a company to which their own has sold out. One company cannot turn over its policy-holders in such manner to another.³]

Payment or tender of payment of premiums is not necessary where the insurers have already declared the policy forfeited, or done any other act which is tantamount to a declaration on their part that they will not receive it if tendered.⁴ So non-payment of premium was held excused under the following circumstances: A tender of overdue premiums was refused on the ground that the policy had lapsed. A decree was obtained declaring the policy valid, and giving the plaintiff the election of paying the overdue premiums in forty days, or demanding a paid-up policy. The latter was demanded, and the policy returned to the company, with an instrument cancelling the same. Both were retained by the company, which made no response, but appealed. The judgment was modified on appeal by striking out the option to a paid-up policy. The insured subsequently died, and a demand was made for the return of the policy and deed of cancellation, to which no response was made; but the company again appealed, when the last judgment was affirmed. And the company was held to be estopped from insisting that the premiums would have been accepted if offered. Nor could the company claim compound interest on the overdue premiums.⁵

A policy containing a provision that the same should "cease

¹ *Universal Ins. Co. v. Whitehead* (Miss.), 10 Ins. L. J. 337. But see *contra*, *Coffey v. Universal Life Ins. Co.*, C. Ct. (Wis.), 10 Ins. L. J. 525.

² [*Dorion v. Positive Gov. Life Ass. Co.*, 23 L. C. Jur. 261; *Burdon v. Mass. Safety Fund Ass.*, 147 Mass. 360]

³ [*People v. Empire Mut. Life Ins. Co.*, 92 N. Y. 105.]

⁴ *Pilcher v. New York Life Ins. Co.* (La.), 10 Ins. L. J. 312; [*Manhattan Life Ins. Co. v. Smith*, 44 Ohio St. 156.]

⁵ *Hayner v. American, &c. Ins. Co.*, 69 N. Y. 435.

and determine" if the premium should not be paid when due, is not forfeited by the failure to pay such premium on the day it is due, where the company neglected to inform the assured of a change in the agent authorized to receive the same, after they had adopted a rule to give such notice in all cases, and the assured tendered the premium in due season to the former agent of the company, and was unable to find the new agent after reasonable inquiry. In such a case the assured is entitled to a reasonable time before a forfeiture can be declared. The failure to pay such premium for sixty days after it was due is not, under such circumstances, an unreasonable time, where the company had waived the time of payment in the previous year, and it did not appear at what time, if ever, the assured was informed of the place of payment.¹

So where a company has been in the habit of giving notice of the time when, place where, or person to whom, a premium may be paid, the failure to pay promptly will be excused by failure to give such notice.² So where it has been the course of dealing between the parties that the insured should pay the premium about the time it was due, sometimes before and sometimes after.³ But an assurance before the policy is signed, that the insured may have indulgence about his payments, is of no avail, all prior negotiations being merged in the contract.⁴ It was held in a case where the insured had paid a loss, and waived the non-payment of a note, that this fact was evidence for a jury of a waiver in a second case.⁵

Where the policy provides for forfeiture, and also that the

¹ *Seamans v. Northwestern Mut. Life Ins. Co.*, C. Ct. (Minn.), 3 Fed. Rep. 325; s. c. 10 Ins. L. J. 153; *post*, § 360; *Southern Life Ins. Co. v. McCain*, 96 U. S. 84; *Braswell v. American Life Ins. Co.*, 75 N. C. 8. [A failure of the company to give the assured notice of a change of agency, by which he is prevented from making punctual payments, estops the company. *Briggs v. National Life Ins. Co.*, 11 Fed. Rep. 458 (Mass.), 1882; *Selvage v. John Hancock Mut. Life Ins. Co.*, 12 Fed. Rep. 603 (N. Y.), 1882.]

² *Insurance Co. v. Eggleston*, 96 U. S. 572.

³ *Dilleber v. Knickerbocker Life Ins. Co.*, 7 Daly (N. Y.), 540. See also *Cotton States Ins. Co. v. Lester*, 62 Ga. 247; *post*, §§ 361, 363.

⁴ *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544; *McCraw v. Old North, &c. Ins. Co.* (N. C.), 8 Ins. L. J. 446.

⁵ *Bowman v. Agricultural Ins. Co.*, 2 N. Y. S. C. 261.

insurers may cancel or maintain the policy on notice, the policy remains valid till notice of cancellation.¹

Where the risk is suspended while an overdue premium remains unpaid, during the suspension no premium is earned; and if the company afterwards demand and receive the full premium in cash, as if no suspension had taken place, and after notice of a loss which happened during the suspension, they will be liable for that loss, unless there is a stipulation that in case of such default the whole premium shall be considered as earned.²

§ 359. **Premium; Payment; Evidence.** — The recital in the policy of the receipt of the premium is *prima facie* evidence of the payment, but only *prima facie*. Like all other receipts, it is open to explanation.³ In *Southern Life Insurance Company v. Booker*,⁴ it was held that if a policy acknowledging payment of the premium be delivered unconditionally, and without fraud, the insurers are estopped to deny the payment as a ground of forfeiture,⁵ but they may show the non-

¹ Dalloz, Jur. Gén., 1844, 4, 36, *Comp. des Phœnix c. Dohis*.

² *Joliffe v. Madison, &c. Ins. Co.*, 39 Wis. 111. See also *ante*, § 4; *Gorton v. Dodge County, &c. Ins. Co.*, 39 Wis. 121; *Kirk v. Dodge County, &c. Ins. Co.*, 39 id. 138; *Shultz v. Hawkeye Ins. Co.*, 42 Iowa, 239.

³ *Pitt v. Berkshire Life Ins. Co.*, 100 Mass. 500; *Sheldon v. Atlantic Fire & Mar. Ins. Co.*, 26 N. Y. 460; *Baker v. Union Life Ins. Co.*, 43 id. 283, overruling s. c. 6 Abb. Pr. N. S. 144; *New England Mut. Life Ins. Co. v. Hasbrook*, 32 Ind. 447; *Miller v. Brooklyn Life Ins. Co.*, U. S. C. Ct. (Md.), 2 Big. Life & Acc. Ins. Cas. 34; s. c. 12 Wall. (U. S.) 288. [A receipt is not conclusive evidence, but may be contradicted, varied, or explained by oral testimony. *Ryan v. Rand*, 26 N. H. 12 at 15; *Life Ins. Co. v. Davidge*, 51 Tex. 244; *Todd v. Piedmont, &c. Life Ins. Co.*, 34 La. An. 63 at 66 and 67.] In other courts the acknowledgment, in the absence of fraud, is held to be conclusive. *Provident Life Ins. Co. v. Fennell*, 40 Ill. 398; *Michael v. Nashville Ins. Co.*, 10 La. An. 737; *La Compagnie D. Ass., &c. v. Grammon (Q. B. Montreal)*, 3 Leg. News, 19; *Consolidated, &c. Ins. Co. v. Cashow*, 41 Md. 59; *Trager v. Louisiana, &c. Ins. Co. (La.)*, 9 Ins. L. J. 817. And see *post*, § 584.

⁴ 9 Heisk. (Tenn.) 606.

⁵ [A company cannot deny the payment of a premium acknowledged in the policy, for the purpose of denying the legal existence of the policy. *Home Ins. Co. v. Gilman*, 112 Ind. 7; *Bosch v. Humboldt Mut. Fire & Mar. Ins. Co.*, 35 N. J. L. 429 at 431; *Illinois Cent. Ins. Co. v. Wolf*, 37 Ill. 354 at 356; *Teutonia Ins. Co. v. Mueller*, 77 Ill. 22 at 24. If the policy is to be incontestable except for fraud, and it states that the premium was paid, the company cannot

payment in order to enforce the payment; otherwise, if the policy be conditionally delivered.¹ In *Norton v. Phoenix Life Insurance Company*,² it appeared that the local agent of a life insurance company took out a policy on his own life for the benefit of his wife. He was supplied by his principal with renewal receipts, all of which by their terms were to be valid only upon their being countersigned by the agent. He took a receipt for the premium paid by him one year, but did not countersign it. It was not disputed that the premium was paid for that year. But for the next year only a renewal receipt, not countersigned by him, was found among his papers after death, and payment of the loss was resisted on the ground that the premium for the last year was not paid. But an equally divided court held that there was no error in the instruction to the jury that the last-named receipt was *prima facie* evidence of the payment of the premium. And in *Myers v. Keystone Mutual Life Insurance Company*,³ the court were inclined to the same opinion. But in Massachusetts, in a case⁴ where the policy provided that it should not be in force till countersigned by the agent, and as, in the Connecticut cases, the policy was upon the life of such agent, and was found after his death amongst his papers, but not countersigned, the court held that the policy never was in force.

§ 360. **Payment of Premium; Waiver.** — The prepayment of a premium may be waived by an assurance that the payment of the money on delivery of the policy “makes no difference.”⁵ And if the agent be authorized to receive the premium, an agreement between the applicant and the agent that the latter will be responsible to the company for the amount, and hold the applicant as his personal debtor there-

dispute this as against the beneficiary, although the orders given for a part of the premium were not honored. *Kline v. National Ben. Ass.*, 111 Ind. 462.]

¹ *Whiting v. Mass., &c. Ins. Co.*, 129 Mass. 240.

² 36 Conn. 503.

³ 27 Pa. St. 268.

⁴ *Badger v. American Pop. Life Ins. Co.*, 103 Mass. 244.

⁵ *Bragdon v. Appleton Mut. Ins. Co.*, 42 Me. 259; *Bodine v. Exch. Fire Ins. Co.*, 51 N. Y. 117.

for, is a waiver of the stipulation in the policy that it shall not be binding till the premium is received by the company or its accredited agent.¹ The same is true if the language of the policy is that the premium shall be paid before the policy shall become valid.² And if the policy requires actual payment, and the assured offers to draw his check for the amount of the premium upon the bank where the agent also keeps his account, the cashier telling him at the time the arrangement for insurance was made that he could have the money, but the agent said, "Let the money lie, and I will draw for it when I want it," and did actually draw it, but not till after the loss, this is also a waiver of prepayment.³ And in fact the delivery of the policy without exacting the payment raises the presumption that a credit is intended, and is a waiver of the condition of prepayment.⁴ The waiver may also be inferred from any circumstances fairly showing that the insurers did not intend to insist upon the prepayment of the premium as a condition precedent.⁵ And so the non-payment of an annual premium due on a specified day may be waived.⁶ So if a foreign insurance company withdraw its agent, to whom by the contract payment may be made, it cannot set up the non-payment as a forfeiture, it being of the essence of every contract that if one party to it prevents its performance by the other, the former cannot be allowed to reap any benefit from the non-performance.⁷

¹ *Sheldon v. Conn. Mut. Life Ins. Co.*, 25 Conn. 207; *Behler v. German Mut. Fire Ins. Co. (Ind.)*, 9 Ins. L. J. 778; *Southern Life Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606. *Contra*, if the application states that the agent has not power to waive payment. *Greene v. Lycoming Fire Ins. Co.*, 91 Pa. St. 387.

² *Bouton v. American Mut. Life Ins. Co.*, 25 Conn. 542.

³ *New York Central Ins. Co. v. Nat. Prot. Ins. Co.*, 20 Barb. (N. Y.) 469; *Hallock v. Com. Ins. Co.*, 2 Dutch. (N. J.) 268.

⁴ *Wood v. Poughkeepsie Ins. Co.*, 32 N. Y. 619; *Boehen v. Williamsburgh Ins. Co.*, 35 N. Y. 131; *Miller v. Brooklyn Life Ins. Co.*, 12 Wall. (U. S.) 285, 288; *Sheldon v. Atlantic Fire & Mar. Ins. Co.*, 26 N. Y. 460.

⁵ *Heaton v. Manhattan Fire Ins. Co.*, 7 R. I. 502; *Goit v. Nat. Prot. Ins. Co.*, 25 Barb. (N. Y.) 189.

⁶ *Bouton v. Am. Mut. Life Ins. Co.*, 25 Conn. 542; *Mowry v. Home Ins. Co.*, 9 R. I. 346; *Rockwell v. Mut. Life Ins. Co.*, 20 Wis. 335; 1 Big. Life & Acc. Ins. Cas. 699.

⁷ *Ante*, § 356; *Hamilton v. Mutual, &c. Ins. Co. (C. Ct.)*, 9 Blatch. 234;

If a condition of the policy stipulate that acceptance of an overdue premium shall be considered an act of grace or courtesy, and not as a waiver of forfeiture if any future payment of premium be omitted on the day it falls due, such acceptance will nevertheless be a waiver of forfeiture on account of neglect to pay the overdue premium accepted.¹ And such a stipulation will be regarded as a mere notice, if printed on the back of the policy, and not referred to in it.²

[§ 360 A. **Waiver of Prepayment.** — A delivery of the policy without payment of the premium waives its prepayment as a requisite to the contract's taking effect, though such a condition is contained in the policy.³ When a policy contained a clause declaring that the company would not be liable unless premiums should be actually paid; and where the policy was delivered by the company's agent, who waived prepayment and fixed no time for the same; and when payment was several times demanded but not made, but the policy was not cancelled nor any notification of an intent to cancel given; it was held that payment was waived and the company was liable.⁴ A waiver of prepayment may be inferred from any circumstance indicating that the company did not intend to insist on it.⁵ Sending the policy by mail to the agent of the plaintiffs to be delivered to them is evidence to go to the jury.⁶ Where the company sent the policy by mail, saying its agent would call for the premium, and when he called the plaintiff was away, and the agent left word for him to forward the premium, it was held that he had a reasonable time in which to do so, and that

Manhattan Life Insurance Co. v. Warrick, 20 Grat. (Va.) 614; *post*, §§ 463, 488, 505.

¹ *American Life Ins. Co. v. Green*, 57 Ga. 469. See also *post*, § 511.

² *Girard Life Ann. & Tr. Co. v. Mut. Life Ins. Co.* (Pa.), 9 Weekly Notes of Cases, 425 (1881); *post*, § 363.

³ [*Equitable Ins. Co. v. McCrea, Maury & Co.*, 8 Lea (Tenn.), 541; *Hodge v. Security Ins. Co.*, 33 Hun, 583; *Little v. Insurance Co.*, 38 Ohio St. 110; *Bodine v. Exchange Fire Ins. Co.*, 57 N. Y. 117 at 123-124.]

⁴ [*Washoe Tool Manuf. Co. v. Hibernia Fire Ins. Co.*, 66 N. Y. 613 at 614.]

⁵ [*Universal Fire Ins. Co. v. Block*, 109 Pa. St. 535, and following case.]

⁶ [*Equitable Ins. Co. v. McCrea*, 6 Lea (Tenn.), 541 at 544.]

the company was liable for a loss within that time, though after notice of cancellation and before tender of premium and in spite of the provision in the policy that it should be void if the premium was unpaid.¹ The condition requiring payment of the premium to the company before the policy goes into effect may be waived in many ways, and facts tending to show a waiver should go to the jury.² A course of dealing between the parties allowing credit on premiums governs the printed condition as to payment of premiums.³ Usage of the agents and company in their dealings generally may waive the payment of the premium as a condition precedent to the attaching of the risk.⁴ Evidence of a custom of the company not to enforce the condition as to prepayment of premiums, and to allow sub-agents to give credit and charge themselves with the amount, is competent in showing a waiver of prepayment.⁵

[§ 360 B. **Credit for the Premium.** — A distinct agreement of the agent to give credit, or conduct indicating such intent, in accordance with a usage will waive the prepayment of the premium.⁶ Delivery of the policy without payment of the premium makes a *prima facie* case of credit, and in any case where credit is intended the policy is valid although the premium is never paid, and it continues in effect until cancelled for non-payment.⁷ An agent authorized to take and approve risks and to insure may allow credit for the premium.⁸ A general agent may waive the condition as to payment of the first premium, and give credit, even though the policy declares

¹ [Carson v. German Ins. Co., 62 Iowa, 433.]

² [Elkins v. Susquehanna Mut. Fire Ins. Co., 113 Pa. St. 386.]

³ [Lebanon Mut. Ins. Co. v. Hoover, 113 Pa. St. 591.]

⁴ [Frankle v. Pa. Fire Ins. Co., 12 Ins. L. J. 614 (Col.), 1883.]

⁵ [Peppit v. North Brit. & Mer. Ins. Co., 1 Russ. & Geld. (Nov. Sco.) 219.]

⁶ [Yonge v. Equitable Life Ins. Co., 30 Fed. Rep. 902 (Tenn.), 1887; Tenant v. Travellers' Ins. Co., 31 Fed. Rep. 322 (Col.), 1887.]

⁷ [East Tex. Fire Ins. Co. v. Mims, 1 Tex. Civ. Cas. § 1323; Latoix v. Germania Ins. Co., 27 La. Ann. 113; Wilson v. Herkimer Ins. Co., 6 N. Y. 53; Miller v. Life Ins. Co., 12 Wall. 285.]

⁸ [Jones v. Ætna Ins. Co., 7 Rep. 644 (Mass.) 1879; Ball, &c., Wagon Co. v. Aurora Fire, &c. Ins. Co., 20 Fed. Rep. 232 (Ind.), 1884; Insurance Co. v. Colt, 20 Wall. 560, (1874).]

that the contract cannot be modified except by writing signed by the president or secretary.¹ An insurer does not lose his right to recover on a policy, because he has not paid the premium, if the agent did not exact payment at the time of the contract, but in response to the request that a bill of the same should be sent, said "That was all right," although the secretary of the company had unsuccessfully tried to find the assured and get payment, in the mean time, but had not cancelled the policy or given notice of an intent to do so.² Where an insurance agent with no authority to give credit had given to the assured a policy before payment of the premium, but had accounted to the company therefor, it was held that the company could not then object to the credit.³ A sub-agent employed to solicit applications, collect premiums, and deliver policies has no authority to give credit or receive anything but cash in payment; and therefore a company is not liable on a policy not delivered when the sub-agent has acted contrary to the above rule, in the absence of any evidence showing that he was allowed to substitute his own liability to the company in place of the premium.⁴ Agents of a stock insurance company whose instructions were not to deliver policies until the whole premiums were paid, did so deliver before such payment, giving credit to the insured and waiving a cash payment, and it was held that the company was liable on the insured's death. There was evidence in this case to show that it was the custom of the agents to give credit, and that this was known to the company.⁵ Where the insured put the premium in the hands of the broker who had effected the insurance, and the agent gave credit to the broker and afterwards reported and paid the amount thereof to the company, the question of payment went to the jury.⁶

¹ [O'Brien v. Union Mut. Ins. Co., 22 Fed. Rep. 586 (Minn.) 1884.]

² [La Société de Bienfaisance, &c. v. Morris, &c. Agts. of Home Mut. Ins. Co., 24 La. Ann. 347 at 348.]

³ [Agricultural Ins. Co. v. Montague, 38 Mich. 548 at 549.]

⁴ [Continental, &c. Ins. Co. v. Willets, 24 Mich. 268, 272, 273. See § 360 D.]

⁵ [Miller v. Insurance Co., 12 Wall. 285, 303.]

⁶ [Pittsburg Boat-Yard Co. v. Insurance Co., 118 Pa. St. 415.]

[§ 360 C. **Waiver ; Agent ; Method prescribed in Policy.** — An agent may waive the condition respecting forfeiture for non-payment of an instalment, and agree to give notice when each payment is due, failure of which notice shall excuse payment.¹ If an agent authorized to receive premiums wrongly informs the insured as to the date his premium is due, the company is estopped. The agent may not be bound to give such information, but if he attempts to do so, he must be correct.² One who called the day after the premium was due and was told by the agent that the "life" had attended to it himself, may show these facts as evidence of waiver of the forfeiture.³ A circular issued by the company stating that it will not insist on the forfeiture of policies because of the non-payment of interest, is available in a court of law, to save forfeiture.⁴ Where the policy specifies the only method in which its conditions can be waived, evidence tending to prove waiver of non-payment of an instalment by other means will be excluded. Evidence of laxity in collection and a habit to receive long after due, will not be received.⁵ If a policy declares that only the president and secretary have power to waive conditions, no other agent can waive the necessity of prepayment of the premium.⁶ Voluntary payment by the company in case of an accident, in spite of the fact that the premiums had not been paid, does not raise a presumption that the premiums had been paid so as to compel the company to pay for a subsequent accident. The plaintiff cannot come into court saying, "It is true the premiums were not paid, but the company has acted as though they had been; therefore as against it they are conclusively presumed to have been paid." The generosity of the company cannot be made a handle for injustice.⁷]

¹ [Alexander v. Continental Ins. Co., 67 Wis. 422.]

² [Selvage v. John Hancock Mut. Life Ins. Co., 11 Ins. L. J. 653 (N. Y.), 1882.]

³ [Robertson v. Metropolitan Life Ins. Co., 47 N. Y. Super. 377.]

⁴ [Robinson v. St. Louis Mut. Life Ins. Co., 7 Rep. 358 (Mo.) 1878.]

⁵ [Barnes v. Continental Ins. Co., 30 Mo. App. 539.]

⁶ [Calhoun v. Union Mut. Ins. Co., 19 N. B. R. 13.]

⁷ [Melin v. Accident Ins. Co., 70 Wis. 579, 584.]

[§ 360 D. **Waiver of Payment in Cash.**¹ — An agent authorized to deliver policies and receive payment may waive the payment of the premium in cash notwithstanding a stipulation in the policy to the contrary.² In another case it was said that a general agent of a foreign insurance company may waive such a condition, but a local agent cannot.³ The president of an insurance company certainly may waive the condition.⁴]

[§ 360 E. Where the premium was not paid when due nor within thirty days thereafter, but on the 31st day the plaintiff's agent called on the secretary of the company, offered to pay the premium, and was told that the husband of the plaintiff had attended to the matter, and three or four days later finding that this was a mistake plaintiff tendered the premium, which was then refused, it was held that the company was not bound. The policy lapsed at the end of the thirtieth day, and could be revived only by a new agreement by the operation of an estoppel or of a waiver. There was no new agreement nor any estoppel, because the plaintiff was in no way prejudiced by the untrue answer of the secretary, nor any waiver, because what was said by the secretary was evidently said under a mistake, and not with knowledge of the facts.⁵]

[§ 360 F. **Decisions adverse to Waiver.** — An agent's authority to collect or receive payment does not include authority to make an agreement to extend the time of payment.⁶ An insurance solicitor as such has no authority to waive the payment of the premium.⁷ When the application states that the payment of the premium is a condition precedent to the contract or issuing of the policy, the policy is not in force until the premium is paid, and the agent cannot waive such a condition.⁸

¹ [See § 360 B.]

² [Home Ins. Co. v. Gilman, 112 Ind. 7.]

³ [Willcuts v. Northwestern Mut. Life Ins. Co., 81 Ind. 300.]

⁴ [Mo. Valley Life Ins. v. Dunklee, 16 Kan. 158 at 165.]

⁵ [Robertson v. Metropolitan Life Ins. Co., 88 N. Y. 541, 545.]

⁶ [Hutchings v. Munger, 41 N. Y. 155 at 158.]

⁷ [Hambleton v. Home Ins. Co., 6 Biss. (U. S.) 91 at 94.]

⁸ [Ormond v. Insurance Co., 96 N. C. 158.]

In the absence of express authority an agent of an insurance company has no power to waive the payment even of a part of the premium,¹ especially when the policy states that no agent shall make any contract or waive any condition of the policy. The company is not bound to continue giving notice in respect to payment of annual dues, merely because it has been accustomed to do so in the past, and its failure to do so is no waiver of the non-payment.² A usage among companies to receive premiums when overdue is inadmissible to save a forfeiture.³

[§ 360 G. **Waiver of Statute Provisions.** — A statute making policies binding for the full amount for two years after the payment of the first premium, anything in the policy to the contrary notwithstanding, may be so far waived that the insured may agree to take only a sum in proportion to the premium paid.⁴ But such a law cannot be waived by agreement, so as to make the policy entirely forfeitable.⁵]

§ 361. **Practice of Company to accept Overdue Premium.** — Forfeitures are so odious in law that they will be enforced only where there is the clearest evidence that such was the intention of the parties. If the practice of the company and its course of dealings with the insured and others known to the insured, have been such as to induce a belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted on, the company will not be allowed to set up such forfeiture, as against one in whom their conduct has induced such belief.⁶ Accordingly, a custom

¹ [Brown v. Mass. Mut. Life Ins. Co., 59 N. H. 298 at 308.]

² [Mandego v. Centennial Mut. Life Ass., 64 Iowa, 134.]

³ [Girard Life Ins. &c. Co. v. Mut. Life Ins. Co., 97 Pa. St. 15.]

⁴ [Caffrey v. John Hancock Mut. Life Ins. Co., 27 Fed. Rep. 25 (Mich), 1886.]

⁵ [Wall v. Equitable Life Ass. Co. 32 Fed. Rep. 273 (Mo.), 1887.]

⁶ [If the company has in any way induced an honest and prudent belief that premiums will be accepted after the day appointed, it cannot insist on a forfeiture; mere indulgence will not be enough, but an established course of dealing between the parties will be. Sweetzer v. Odd Fellows Mut. Aid Ass., 117 Ind. 97; Tripp & Bailey v. Insurance Co., 55 Vt. 100. If the company by its habits of business induces the insured to believe that payment may be delayed until demanded, and no demand is made, the company is estopped to set up the forfeiture. Home Protection Ins. Co. v. Avery, 85 Ala. 348. A habit of the company to

amongst insurance companies to receive premiums, if tendered at any time within thirty days of the time they fall due, provided the insured is in usual health, and evidence that this is the custom among companies issuing policies stipulating that non-payment of premiums at the day specified shall work a forfeiture, has been held to be admissible against a company having a similar provision for forfeiture, which is shown to have repeatedly received, within thirty days after due, of the assured, against whom it insists upon the forfeiture, premiums, which by the terms of the policy were payable on a certain day on penalty of forfeiture.¹

§ 362. **Premium; Acceptance of Post Payment; Waiver.** — And generally the acceptance of a premium after full knowledge of the violation of the condition of a policy, respecting the payment of the premium, or otherwise, is a waiver of any forfeiture thereby. Thus, where a policy inhibits the insured from passing without the limits of the United States, but has indorsed thereon a permit to go to California by a certain route, and the insured goes by a different route, and the insurers after the arrival of the insured in California, and with full knowledge of the fact of deviation, accept one or more annual premiums (whether there is or is not a forfeiture by reason of the deviation is a question which was not decided), it is not open to the insurers to take the objection, for the

receive premiums from the insured after maturity may estop the company as to a subsequent premium paid about the usual time after it was due, although the insured died between its maturity and its payment. *Spoeri v. Mass. Mut. Life Ins. Co.*, 39 Fed. Rep. 752 (Mo.), 1889. And non-payment is waived by proof of a *general usage* to receive premiums after date, and it is not necessary to show that the defendant adopted the custom. *Blakiston v. Insurance Co.*, 15 Phil. 315. But receiving overdue premiums several times, always with an inquiry into the health of the assured and a statement that the receipt was optional with the company, will not constitute a course of dealing that will require the company to receive overdue premiums. *Mut. Life Ins. Co. v. Girard Life Ins. Co.*, 100 Pa. St. 172.]

¹ *Helme v. Philadelphia Life Ins. Co.*, 61 Pa. St. 107; *Thompson v. St. Louis Ins. Co.*, Sup. Ct. (Mo.), 2 Ins. L. J. 422; *Buckbee v. U. S. Ins. & Tr. Co.*, 18 Barb. 541; *Girard Life Ann. & Tr. Co. v. Mut. Life Ins. Co. (Pa.)*, 9 Weekly Notes of Cases, 425. The evidence is admissible, even though the policy be forfeitable "for non-payment of premium on the day it is due." *Ibid.*; *Union Central Life Ins. Co. v. Pottker*, 33 Ohio St. 459; *Mayer v. Mutual, &c. Ins. Co.*, 38 Iowa, 344. See also *ante*, § 358.

acceptance of a subsequently accruing premium with knowledge is a waiver of the forfeiture, if any there be. And parol evidence is admissible to show such knowledge, and thus establish the waiver.¹ And such acceptance has been held to be a waiver of forfeiture by reason of concealment in the application.² So a part payment of an overdue premium, if accepted, is a waiver of the forfeiture for non-payment when due.³ So is a prepayment to an apparently authorized, though really unauthorized agent.⁴ Consent of the insurers to an extension of the time of payment of a premium is a waiver of forfeiture for non-payment at maturity.⁵ But an agent cannot revive a forfeited policy by giving an antedated receipt for an overdue premium:⁶ and the failure to disclaim an unauthorized act of an agent in receiving, after the death of the insured, an overdue premium, and to return the premium, is not a waiver of the forfeiture, as it could not prejudice the rights of the insured.⁷ [The receipt of overdue premiums is a waiver of the forfeiture by their non-payment,⁸ unless the policy stipulates that on default the overdue premiums or instalments shall be considered as earned.⁹ Where it is provided that a policy may be revived by a *payment* of the premium or assessment in default, a mere *offer* to receive the money in default or a *demand* of it, even by suit, will not amount to a waiver. There must be actual payment to revive the policy.¹⁰] It has been said that the

¹ *Bevin v. Conn. Mut. Life Ins. Co.*, 23 Conn. 244; *Wing v. Harvey*, 5 De G., M. & G. 285; *Froehlich v. Atlas Life Ins. Co.*, 47 Mo. 406; *Georgia, &c. Life Ins. Co. v. Gibson*, 52 Ga. 640. And see *ante*, § 360; *post*, § 554. Not, however, if the back premiums are accepted under false impressions as to the present condition of the life, induced by the untruthful statements of the life. *Harris v. Equitable, &c. Ins. Co.*, 6 T. & C. (N. Y.) 108.

² *Armstrong v. Turquand*, 9 Ir. C. L. Rep. 32.

³ *Hodsdon v. Guardian Life Ins. Co.*, 97 Mass. 144.

⁴ *Eclectic, &c. Ins. Co. v. Fahrenkrug*, 68 Ill. 463.

⁵ *Homer v. Guardian, &c. Ins. Co.*, 67 N. Y. 478.

⁶ *Diboll v. Ætna Ins. Co. (La.)*, 9 Ins. L. J. 827.

⁷ *Busby v. North America, &c. Ins. Co.*, 40 Md. 572.

⁸ [*Wyman v. Phoenix Mut. Life Ins. Co.*, 45 Hun, 184.]

⁹ [*Cohen v. Insurance Co.*, 67 Tex. 325.]

¹⁰ [*Id.*; *Ware v. Millville Fire Ins. Co.*, 45 N. J. 177; *Edge v. Duke*, 18 L. J. Ch. 183.]

acceptance of an overdue premium is no waiver unless the assured show that when accepted he was in good health.¹ But this is doubtful, unless the acceptance be expressly subject to that condition.² But where the receipt itself expressly stated that the acceptance of an overdue premium should not have the effect to continue the policy, unless the insured was at the time of the payment in good health, and in point of fact he was dangerously ill, it was held that there could be no recovery.³

§ 363. **Premium ; Part Payment and Acceptance ; Waiver.**—In *Thompson v. St. Louis Mutual Life Insurance Company*,⁴ an attempt seems to have been made to avoid the effect which courts are inclined to give to the acceptance of postpaid premiums, by a statement at the foot of the policy that “if a premium is received by the company after the day named in the policy for its payment, it is considered by the company and by the assured as an act of grace or courtesy, and forms no precedent as regards future payments.” But the court held, nevertheless, a known practice of receiving payments of premiums after they were due to be a practical construction of the force and effect of the provision for prompt payment, and a waiver of a forfeiture by reason of a failure strictly to conform thereto. “In contracts of insurance, as in other contracts,” said the court, by Adams, J., “the parties may make the time of the performance of any stipulation of the very essence of the contract. In such case the contract becomes utterly at an end or void as soon as the default is made. The stipulation in regard to the time of the payment of the premiums in this policy I do not regard as of the essence of the contract. It was not so regarded by the parties themselves. By their acts and conduct the parties have construed this contract for themselves. It was not regarded by either party as of the essence of the policy that

¹ *Mowry v. Home Ins. Co.*, 9 R. I. 346.

² *Rockwell v. Mut. Life Ins. Co.*, 20 Wis. 335.

³ *Bissell v. American, &c. Ins. Co.* (Ct. of Com. Pleas, Lucas Co., Pa., 1871),

2 Big. Life & Acc. Ins. Cas. 150; *post*, § 502.

⁴ 52 Mo. 469.

the premiums would be paid on the very day that they became due. The memorandum at the foot of the policy did not give any additional force to the stipulation in the policy, if we may consider it as having any effect whatever. If it had any force, it seemed to be looked upon by the parties as a license or invitation to the plaintiff to disregard the exact day of payment, and to rely upon the courtesy of the company. The plaintiff pursued this course, and instead of making his payments on the very day when due, let them lie over for a short time, and still they were received without objection. The plaintiff was thus induced to believe that a failure of strict payment on the day would not prejudice his rights.”¹

§ 363 a. **Non-forfeiture ; Paid-up Policy; Profits.** — An interesting and important case is thus stated by Treat, J.:—

“On the 29th day of February, 1868, the defendant issued a non-forfeitable policy. The sum insured was \$10,000; annual premium, \$615.40; number of premiums to be paid, ten; term, natural life of the insured, ‘with participation in the profits.’ Payment of the \$10,000 was to be made within sixty days after death and proof thereof,—‘the balance of the year’s premium, if any, and all indebtedness due or to become due to the company to be first deducted therefrom.’ This seems to contemplate that there would be, or might be, a part of a year’s premium and other indebtedness due at the death of the insured.

“The policy further provides that ‘in case’ ‘the premium as aforesaid’ shall not be paid ‘on or before the day herein mentioned for the payment thereof, or any note or notes which may be given to and received by said company in part payment of any premium, on the day or days when the same shall become due,’ the policy shall become void.

“It further provides that ‘the dividend of profits which may become payable by virtue of this policy to the holder thereof shall be applied toward the payment of the note, taken for part premiums aforesaid,’ and that if this policy ‘shall become void, said holder of the policy shall be liable to pay to said company the amount of all notes taken for premiums

¹ And see *ante*, § 360; *post*, §§ 473, 511.

which shall remain unpaid, except the balance remaining unpaid on the note taken for part premiums and made payable at twelve months from date, and that the said last-mentioned note is to be cancelled by said company on the surrender and cancellation of said policy.'

"There is also a clause absolving the company from liability if the insured becomes an inebriate, 'on paying to the holder thereof . . . the amount of all unearned premiums actually received thereon up to the time of such payment.'

"The next and last provision is as follows: 'After two annual payments, should the party wish to discontinue (notice to the company being given before the next premium becomes due), the company will issue a paid-up policy for as many tenths of the amount originally assured as there have been annual premiums paid in cash.'

"In this case the required notice was given after four payments had been made, and a paid-up policy was demanded for the prescribed four-tenths of the amount insured. The defendant refused the request, unless the plaintiffs would first pay their notes for premiums held by the company; contending that the last clause, cited above, contemplated a previous payment of the annual premiums in cash. The plaintiffs, on the other hand, insist that those notes are mere loans to them, to be paid out of their share of dividends, should their share equal the amount of said notes, at the death of the assured, — said notes being a lien on the policy for the sum finally due thereon, — or, if that be not the true construction of the policy, then the defendant should issue a paid-up policy for \$4,000 less the amount of said notes.

"The terms of the policy, as to notes quoted above, are not very clear; for they seem to imply in one phrase that many notes for premiums may be outstanding, and in another phrase, that there can be only one outstanding note of the kind, and that for a part of the last premium due.

"The course of dealing between the parties, however, has put a practical construction on the contracts. The receipt for each annual premium paid (as for the last in this case) is as follows: —

“ ‘Received from Clinton O. Dutcher \$615.40, which continues in force policy No. 3718, issued by this company, until the 29th day of February, 1872, in accordance with the terms and conditions of said policy.

“ ‘Old note returned herewith, the indebtedness being debited against the policy \$547.48.

Amount of premium loaned this year 246.16 — \$793.64.’

“The original agreement, it is admitted, was that of the \$615.40 for the annual premium, \$369.24 should be paid in cash, and \$246.16 in a note at twelve months at seven per cent interest, whereupon a receipt for payment of the whole premium should be given, the amount of said note to be a permanent loan by the company until paid by dividends, and that at the maturity of said note, a new note, at the same rate of interest, should be given, including the \$246.16, and the amount of the former note less the dividend applicable to its payment. This was the mode pursued each year.

“It is further admitted in this case that defendant had always, prior to January 20th, 1871, issued paid-up policies on demand without deducting the loans on outstanding notes, holding such notes as a lien against the paid-up policy; and that since that date the defendant has uniformly refused to issue a paid-up policy unless the holder first paid the outstanding loans or notes.

“As there are many like suits pending against this defendant on somewhat similar policies, issued at different times, it may be well to examine them with reference to any changes made by the company in the terms of its subsequent contracts. Thus, policy No. 6060, issued March, 1869, is the same as that with reference to which this suit is instituted. except that on the back thereof, in print and writing, the cash surrender value of the policy is stated for successive years, — that value being ‘exclusive of the value of any dividend, deposits, or reversions, which the company will pay in addition;’ also that ‘the above amounts, less any outstanding loans or notes, will be paid on the surrender of this policy, duly receipted, within two months after being forfeited by non-payment of premiums.’

“The policies of the defendant were stated from the first to be non-forfeitable; yet they contained clauses of forfeiture. Subsequently, as above, the non-forfeitable provisions were attempted to be defined; that is, a surrender cash value was stated, if the policy was surrendered within two months after forfeiture. Still, in the body of the policy, the forfeiture clause for non-payment of premium and notes when due was retained.

“Policy 5633, issued in January, 1869, omits the words ‘non-forfeiture policy,’ and substitutes for the provision above quoted as the last in the policy No. 3718 (that in question) these words:—

“‘On the surrender of this policy, while in force, after the full amount of two or more annual premiums have been paid in cash, including the payment of any note or notes given on account of premiums, the company will issue a paid-up policy for the amount of premiums paid, less any and all dividends paid on said policy.’

“On the back of policy (No. 5633) was the same agreement as to cash surrender value as that indorsed on policy No. 6060.

“The company had thus added to the new policies, subsequent to plaintiffs’, the requirement of previous payment of notes given on account of premiums; indicating on its part that there was previous uncertainty on that point.

“It thus appears that the policies issued by this company at the commencement were designed to induce the holders to understand that they included several distinct provisions favorable to the insured, viz.:—

“1. They were non-forfeitable. Afterward they defined, under the head of cash surrender value, the precise meaning of their non-forfeitable qualities, and limited to two months the condition of non-forfeiture; still retaining on the face of the policy their non-forfeiture designation, and among the conditions a forfeiture clause. Such seemingly inconsistent and conflicting provisions exact a construction against the company most favorable to the insured.

“2. They gave to the insured a participation in the profits.

For what period of time? When he was insured for his natural life, would not his participation in the profits continue until his death? It matters not that the annual premiums were to cease at the expiration of ten years, if the insurance was for life. The participation in profits may be in various ways, — either by corresponding reduction of premiums, in annual cash dividends, or in additions, with or without accumulations of interest, to the principal sum assured.

“3. The defendant’s policies determined the mode of participation in profits when part-payment of annual premiums was by note. At the time of the next annual premium, which would be the same time the previous note fell due, there would be credited on the note the dividend of profits to which it was entitled. Then the balance, together with the amount payable by note for the next premium, would be included in the new note, and the former note would be cancelled. In that way there would be only one note outstanding. Such was the practical construction given and assented to; yet serious difficulties might have arisen if a forfeiture had been claimed; for it is provided that the holder, when forfeiture occurs, shall be liable to pay all unpaid notes taken for premium, ‘except the balance remaining unpaid on the note taken for part premiums and made payable at twelve months from date,’ and said last note is to be surrendered and cancelled on surrender and cancellation of the policy. If that was the only note which could, in the routine of business, be outstanding, and that was to be surrendered and cancelled, for what would the holder be liable? It would seem he would lose only the cash paid on the premiums, and that his notes would be surrendered. But under the clause concerning inebriates, when the the company cancels a policy, it must pay back the amount of all unearned premiums actually received. What is meant thereby? Actually received only in cash, or both in cash and notes? The main question in dispute here is, whether the defendant is bound to issue a paid-up policy except when the annual payments are actually paid in cash, or the notes given are also first paid in cash. Under the clause concerning inebriates, the company must

pay back the amount of unearned premiums actually received. How received? In cash merely? Certainly, it cannot be fairly contended that the company would absolve itself under that clause by returning the cash payments and holding the assured liable on his notes for premiums. The payment of premiums includes both cash and notes given. Why, then, should not the phrase in the last clause as to annual premiums, 'paid in cash,' receive equally as broad and favorable a construction?

"4. The policies contemplated part payment by note, and indicated how the notes should be treated in connection with the profits, and also how the sum due on said notes should be met when the policy became payable; viz., that the sum insured should be paid, less the amount due on the notes.

"5. If the ten annual payments had been made, the original policy would have stood as a paid-up policy, and the last note would have been outstanding, payable in twelve months, by its terms, less dividend accrued. Was it contemplated that it should be paid at the end of twelve months, when it is admitted that the sum named therein was to be a permanent loan at seven per cent debited against the policy? If so, what was the inducement as to part payment by note, and as to participation in profits to be applied to the payment of the note? How was the participation of profits to be thereafter enjoyed?

"The theory of the plan proposed and acted on was a receipt for the annual premiums as for cash, while actually cash was to be paid for part, and a note was to be received as a cash payment for the balance. Throughout the ten years no actual payment, even of interest on the notes, was expected, but the balance due thereon was carried into a new note.

"Practically, it seems, the plan offered to the insured was found not to work satisfactorily to the company, and hence it changed not only the phraseology of its later policies, but its own interpretation of the earlier policies. It changed the last clause concerning paid-up policies for tenths, as to 'annual premiums paid in cash,' so that it should read, 'including the payment of any note or notes given,' &c.

“Through all the various provisions concerning the non-forfeiture, cash surrender, issuing of paid-up policies for tenths, the giving of notes, the way those notes should be treated on cash surrenders, or cancellation in case of inebrates; in short, throughout the various contingencies attempted to be provided for, the notes are treated as sums to be accounted for on the final payment of the policies, and not before. It is impossible to reconcile the various provisions with each other, or with the manifest theory on which the earlier policies were based, or with the practical construction given, unless it is held that paid-up policies were to be issued for the tenths named, without the previous payment of the notes, or the deduction of them from the amount of said tenths. If deducted, what was to become of the participation of profits, and what of the interest they bore? The conclusion is, that plaintiffs are entitled, on the facts agreed, to their paid-up policy. The company will hold the notes bearing seven per cent interest, and whatever balance due, less dividends, there may be at the time of the death of the assured will be deducted from the tenths assured.

“The defendant agreed that plaintiffs should participate in the profits during the natural life of the assured; that they should give notes for part of annual premiums; that at the expiration of ten annual premiums the policy should be considered paid up; that the dividend should be applied toward payment of the notes; that the amount payable at the death of the assured should be \$10,000, less the balance due on the final note given as above stated. It could not be determined until the death what would be due on that note, for while it bore seven per cent interest annually, it was subject to reduction for dividends. It was uncertain whether the dividends would exceed the interest, or amount to the whole note, principal and interest. Hence, when the paid-up policies for tenths were demanded, the plaintiffs were entitled thereto, without previous payment of the notes.”¹

¹ *Dutcher v. Brooklyn Ins. Co.*, C. Ct. (Mo.), 4 Ins. L. J. 812. As to return premiums, see *ante*, § 4; *post*, §§ 567, 569. As to payment of assessments, see *post*, § 562.

[§ 363 B. **Wrong Refusal to receive Premiums.** — If a company improperly refuses to receive a premium, the measure of damages is the amount required to get other insurance as good as the policy in question,¹ or the insured may treat the policy as at an end and recover all he has paid the company.²

In the West Virginia case the company did not insure persons above sixty-five years of age, and the agents had no rates for any age above that nor any authority to insure older persons. McCall stated to the agent that he was sixty-five years old, adding that he was born on the tenth of July, 1807 (which was the true date), and that the agents could from that fact ascertain his age. At the end of the first year the plaintiff desiring a renewal, paid to the agents the money therefor, and left his policy with them. The company, however, refused to further carry the risk, retained the policy from the plaintiff, lapsed it on its books, and refused to refund the premiums, on the ground that the plaintiff was really sixty-six years old at the time of application. The jury gave a verdict for the plaintiff; and the supreme court refused to interfere with it, remarking that the company was bound by the knowledge of its agents, and that even if it had a right to cancel the policy, it went too far in refusing to refund the premium.

In the Missouri case a wife insured the life of her husband for the benefit of herself and children. Afterward she obtained a divorce from him, but continued to pay premiums on the policy. Finally the company declared the policy avoided by the divorce, the wife no longer having an insurable interest in the husband's life, and refused to refund even the premiums paid after the procurement of the divorce.

The court held that in any event this refusal was unjust, and expressed a strong feeling that the insurable interest of the wife and children was not terminated by the divorce.

On the question of the measure of damages, the court remarked, "Certainly the mere return of the premiums with

¹ [Piedmont, &c. Life Ins. Co. v. Fitzgerald, 1 Tex. Civ. Cas. § 1348.]

² [McCall v. Phoenix Mut. Life Ins. Co., 9 W. Va. 237; McKee v. Phoenix Ins. Co., 28 Mo 383.]

interest would not be the standard in all cases. In many it would be very unjust, especially after the policy had continued for years and the period of existence had consequently been shortened. If the person whose life is insured, though alive, should be laboring under a disease that must speedily result in his dissolution, the insurer would not be permitted to escape the payment of the amount for which the life was assured, by putting an end to the contract of insurance.”¹]

[¹ 28 Mo. p. 387.]

CHAPTER XVIII.

OTHER INSURANCE AND OVERVALUATION.

ANALYSIS.

§§ 364, 364 A. Insurers wish to know the amount of other insurance at any time obtained, in order to determine the motive of the insured to preserve or to destroy the subject-matter, and to enable them to calculate their share of any loss, § 364.

Policies usually provide that other insurance without notice is fatal. The condition is valid, § 364, and its breach avoids the policy, even though the amount of insurance may be reduced below that allowed by the policy, § 364 A. A charter provision is sufficient if attention is called to it in the policy, § 364 A. Sometimes the provision is simply that other insurance shall not exceed a certain sum, § 364 A.

§§ 365–365 C. Other, over, or double insurance, is prior or subsequent insurance of the same subject, risk, or interest, by the same insured, or for his benefit, with his knowledge and assent (365 *et seq.*, definition and examples). A substituted insurance, or a renewal of insurance, of which the company was once notified, is not other insurance, § 365.

nor an existing policy known and cancelled the same day, § 365.

nor a subsequent policy issued by mistake and not recognized, § 365.

nor insurance by another without right, nor in general any insurance without the knowledge of the assured, nor by insurance of a distinct interest in the property, as in case of mortgagor and mortgagee, §§ 365 *n*, 366. In case of a warranty, of course the insured may be bound even by insurance unknown to him, § 365 *n*.

Insurance “to be made” refers to subsequent contracts. *Simultaneous* policies. The companies must have reciprocal notices. If the same agent makes all the policies, his knowledge is that of all the companies. Parts of a day are taken into account in deciding which of two policies was the prior, § 365 *a*.

Where two policies are taken out, each containing a provision against other insurance, a question arises which has given the judges full opportunity to display all variations of *logic*, not to say anything uncomplimentary.

It has been held,

- (1) that the question is upon the *validity* of the other policy on its face and the facts at the *time of insurance*, not of loss, § 365 B.
- (2) that if the second policy is not valid on the *facts* at the *time of loss*, the first is good, § 365, unless the invalidity has been waived, § 365.
- (3) that if the second is *void on its face*, the first is good, but that evidence of extrinsic facts cannot be received, § 365 B.
- (4) that if good on its face, it is fatal, though void by external facts, § 365 B.
- (5) that the first is good if the second is invalid, either void or voidable for breach of condition, although the second company has actually paid its policy, § 365 and notes.
- (6) that the second is good because the first is avoided instantly by the taking out of the second, § 365 B.
- (7) that the first is good, for the second never came into existence, because the existence of the former broke one of the conditions of its existence, § 365 B.
- (8) that if the second company pay their policy the first is void; if the second is treated as void the first is good, 365 B. (Suppose the second company has not acted at the time of suing the first, *quaere*.)
- (9) that if the policy is to be void by other insurance, "valid or otherwise," subsequent insurance, although void, is fatal, § 365 B, and *contra*, § 365 B.
- (10) that the policy is rendered voidable (§ 365) by other insurance, whether enforceable or not, unless it can be shown, not only that the other policy was void, but that the insured understood it to be so. If the insured thought he had double insurance, the spirit and reason of the condition is broken. Such a state of facts at the time the policy in question was issued is fatal, though the first insurance is removed before loss, otherwise with *subsequent* insurance cleared away before loss, unless the agreement is clearly to the effect that the *taking* of other insurance shall be fatal, then the procurement will avoid, irrespective of continuance, § 365 C.

This tenth view seems to me correct. A subsequent policy issued under a mutual mistake as to the existence of the former will not be fatal, § 365 C.

- § 366. If any *part* of the property or interest is covered by another policy, it is a case of double insurance.
- § 367. This condition, like others working forfeiture, is strictly construed.
- §§ 368-372. Notice of other insurance is usually required, and often it is provided that consent of the company must be indorsed on the policy, or at least obtained in writing, §§ 368-372.
- a condition requiring notice of other insurance applies to prior as well as subsequent policies, § 368.

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notice to one no longer agent is insufficient, § 368.
 notice of intention to secure other insurance is sufficient,
 § 368.

{ where *notice in writing* is required, mere knowledge of the
 agent is not sufficient, § 369.
 { so if written consent is required, parol will not do, § 369.
 { and indorsement must be made if required, § 369.
 { on the contrary, other courts hold that it is the duty of
 the company, upon learning of other insurance, to
 indorse consent, or disapprove within a reasonable
 time, and if it does neither it is estopped, § 370.
 { the condition requiring indorsement can be waived as well
 as any other, §§ 370, 365.
 { and written consent is sufficient, though not indorsed as
 required, § 370.

renewal does not require *reconsent*, § 370.

Waiver, §§ 370-372 D.

by notice to a general agent, with his assent or without
 objection, within reasonable time, §§ 370, 372 A,
 372 B, although the policy required written assent,
 § 372 B (delay of three months fatal, § 372 B), other-
 wise as to a mere soliciting agent, § 372 A.

the assured is protected in *bona fide* following the agent's
 advice as to notice, § 372 A.

knowledge of the agent at the issue of the policy waives
 a breach by prior insurance, § 372 C.

and a misstatement by the agent in filling out the
 application will not avail the company, 372 C,
 unless the insured knew of the misstatement,
 § 373 B.

but mere constructive knowledge by the agent is not
 enough, § 372 C.

nor incomplete knowledge, the amount not being
 named, § 372 D.

nor *mere* knowledge, without comment, receipt of
 premium, or other misleading act, §§ 372 D,
 369.

nor is the insured protected by the agent's knowl-
 edge of a policy which he promises not to renew,
 but breaks his promise, § 372 D.

§ 372 E. Misrepresentation as to other insurance is material and fatal if
 such as the company is justified in relying upon.

§ 372 F. Evidence.

proofs of loss showing other insurance are admissions,
 § 372 F.

parol inadmissible where no ambiguity exists.

§§ 373-5. Overvaluation is frequently stipulated against for the same rea-
 son as other insurance, namely, that it influences the
 assured against the preservation of the property. Evi-
 dence of value, § 373.

In some cases it is held that the overvaluation must be
 intentional to be fatal, §§ 373, 373 A.

But others hold, with more reason, that a wilful neglect of the means of information will avoid the policy, even though there is no *intended* fraud, §§ 373 n, 373 A.

And a mistake has been held fatal, §§ 373, 373 A.

It has been said that only a *gross and clear* overvaluation will be fatal, and that it will be so whether there is any condition on the subject or not, § 373.

Others hold a *substantial* excess sufficient, § 373 A.

Want of education is no excuse, § 373 A.

A claim more than double the truth is *prima facie* fraudulent, § 373 A, but not 20 per cent nor 75 per cent excess, § 373 A.

A warranty, of course, shuts out the question of intent, unless other parts of the policy qualify it, § 373 A.

Overvaluation of part of the property does not affect the rest, § 373 B.

Overvaluation that is known to the company, or ought to be known, is waived by rejecting the claim on other grounds. § 373 B.

but not if it is a fraud and the fact is unknown, § 373 B.

nor will knowledge of the agent be sufficient where the assured knows that the company is being deceived, § 373 B.

Under the Maine statute the question is whether the risk is increased, § 373 B.

If the liability is not to exceed three-fourths of the value at the time of loss, overvaluation at the time of insurance is immaterial, § 373 B.

The rule of this topic does not apply to a changing stock of goods, nor in any case where the insurer is only liable for a percentage of the actual loss, § 374.

In case of property on which the insurance is renewed, a depreciation since the first insurance does not give rise to a fraudulent overvaluation, § 375.

§ 376.

A violation of the charter, by insuring for too large a percentage of the real value, does not avoid the policy between the parties.

§ 364. **Other Insurance.** — The insurers may wish to know the amount of insurance upon the particular subject-matter, in order that they may duly estimate the risk, since the greater the amount of the insurance the greater the temptation to destroy the property or life or other subject-matter, or in some other way to bring about the event upon which the loss is made payable. And it is obvious that the interest to know the fact of other insurance is the same, whether it exist at the time of entering into the new contract or be procured

afterwards. Such insurance is sometimes called over-insurance or double insurance. It is also of importance to the insurer to know of other insurance, that he may determine his proportionate liability, in case of being called upon to contribute towards the indemnity for a loss. Insurers may be presumed to rely more upon the interest than upon the character of the insured for protection against the carelessness and fraud of the owners, and therefore take care that the property be so far uncovered by insurance that it is for the interest of the owner that it should not be destroyed. To enable them to do this, it is necessary that they should be informed whether the property on which insurance is applied for is elsewhere insured, and to what extent; and that this interest of the insured may not afterwards be decreased by his procurement of further insurance, the stipulation that the policy shall be void if other insurance exist at the time and be not disclosed, or subsequent insurance be obtained and be not notified to the company, is resorted to.¹ The general doctrine that a previous or subsequent insurance without notice, under a policy requiring notice of such insurance, upon pain of forfeiture, discharges the insurers from any obligation to pay for a loss happening under such circumstances, is well settled and universally recognized. That this should be the effect of the concealment or failure to give notice, as the case may be, is not only a part of the contract, and obligatory upon that ground, but the forfeiture is just and reasonable. The insurer can never know the full extent of his risk, unless he knows everything that bears upon the risk. He has a right to take into account the fact that the insured has a greater or less unprotected interest, whereby his vigilance may be quickened in the preservation of the property; but, in order to estimate this interest truly, he must know to what

¹ *Hutchinson v. West. Ins. Co.*, 21 Mo. 97; *Harris v. Ohio Ins. Co.*, 5 Ohio, 467. The mere failure to mention the fact that there is other existing insurance on the subject-matter upon which further insurance is obtained, there being no inquiry on that point, is not a concealment which will avoid the policy,—at least, unless it be found by the jury material to the risk. *Parsons v. Citizens' Ins. Co.*, 43 U. C. (Q. B.) 261; *McDonell v. Beacon Fire & Life Ins. Co.*, 7 C. P. (U. C.) 308.

extent insurance is actually had. It may be that the insurance is to such an amount as to stimulate to neglect in the preservation, or even to the fraudulent destruction, of the property insured. This prudent insurers should endeavor to guard against; and deception or failure to notify when required on this point operates as a fraud upon them. If they have contracted for that protection, they have a right to its advantages; and the insured cannot be permitted to show that there was no fraud in fact; that the property was vigilantly guarded; that the insured could not have prevented the loss; or even that the insurer — as in case the loss is less than the amount insured by all the policies — is benefited by the over-insurance, since he will only be required to pay, by way of contribution, his proportion of the loss instead of the whole amount stipulated. This is one of those provisions not regarded with the jealousy due to those ordinarily working forfeitures, but will be upheld without reluctance as a fair and just provision for a reasonable and proper purpose.¹

[§ 364 A. A breach of a condition in a policy as to taking other insurance without notice avoids the policy.² Subsequent insurance avoids a prior policy conditioned against it, although two other policies contemporaneous with the said prior policy are avoided by the same act, so that the amount of insurance is thereby reduced within the limit allowed by said prior policy.³ Other insurance *ipso facto* avoids the policy without any action of the company looking toward cancellation.⁴ When the charter provided that the policy should be void for double insurance such insurance was held to avoid it, although on the back of the policy only two out of many sections of the company's charter were printed, which two contained no such provision.⁵ They were, however,

¹ *Obermeyer v. Globe Mut. Ins. Co.*, 43 Mo. 573. See also *ante*, § 13.

² [*Battaille v. Merchants' Ins. Co.*, 3 Rob. (La.) 384 at 386; *Duclos v. Citizens' Mut. Ins. Co.*, 23 La. Ann. 332 at 333; *Funks v. Minn. Mut. Ins. Co.*, 29 Minn. 347 at 354; *Sanders v. Cooper*, 115 N. Y. 279; *Moulthrop v. Farmers' Mut. Fire Ins. Co.*, 52 Vt. 123.]

³ [*Royal Ins. Co. v. McCrea, Maury, & Co.*, 8 Lea (Tenn.), 531.]

⁴ *Johnson v. Amer. Fire Ins. Co.*, 18 Ins. L. J. 724 (Minn.), August 12, 1889.]

⁵ [*Fabyan v. Union Mut. Fire Ins. Co.*, 33 N. H. 203 at 208.]

amply sufficient to call attention to the charter, and it was manifest on the slightest attention that the whole act was not there, and a prudent man would have found out what the other sections contained. When the policy provides that the aggregate insurance shall not exceed a certain sum, insurance to a greater extent than this avoids the policy.¹ If the policy provides that the total insurance shall not exceed two-thirds of the cash value of the property and the plaintiff's evidence shows that it did exceed two-thirds, he will be nonsuited.²

§ 365. **What amounts to Other, Over, or Double Insurance.** — It is additional and valid insurance, prior or subsequent, upon the same subject, risk, and interest, effected by the same insured or for his benefit, and with his knowledge or consent.³ Owners of different interests in the same property and joint owners may respectively insure their interests, without risk of violating a provision against other insurance.³

¹ [Insurance Co. v. Stockbower, 26 Pa. St. 199 at 202.]

² [Bahner v. Insurance Co., 127 Pa. St. 464.]

³ Tyler v. Aetna Ins. Co., 12 Wend. (N. Y.) 507; s. c. affirmed; 16 Wend. 387; Sloat v. Royal Ins. Co., 49 Pa. St. 14; Forbush v. West Mass. Ins. Co., 4 Gray (Mass.), 337; Nichols v. Fayette Mut. Ins. Co., 1 Allen (Mass.), 63; Harris v. Ohio Ins. Co., 5 Ohio, 467; Franklin Mar. & Fire Ins. Co. v. Drake, 2 B. Mon. (Ky.) 47; Park v. Phoenix Ins. Co., 19 U. C. (Q. B.) 110; Roots v. Cincinnati Ins. Co., 1 Disney (Ohio), 138; Kelly v. Liverpool, &c. Ins. Co., 2 Hannay (N. B.), 266. See also *post*, § 366. [Subsequent further insurance by another without right is of no effect. Com. Union Ass. Co. v. Scammon, 126 Ill. 355. The condition pertaining to other insurance applies only to such as is procured by the insured or with his assent, and not to such as may be thrust upon him by officious persons, without his knowledge or assent, and which he repudiates. London, &c. Fire Ins. Co. v. Turnbull, 86 Ky. 230. Where a consignor effected insurance, with the warranty "no other insurance," and unknown to him the consignees also insured the same goods, the first policy was held not avoided. Williams v. Crescent Ins. Co., 15 La. Ann. 651 at 652. The question in a part of the policy (the application) was "What is your title to the property?" — answer, "Contract;" question, "How much insured in other companies?" — answer, "None;" and it was held that the fair interpretation of these questions and answers was that the insured held the property by a contract for the purchase of it, and that he had no sum insured in other companies. Hence, that it was no breach of the warranty that his vendor was otherwise insured. Sprague v. Holland Purch. Ins. Co., 69 N. Y. 128 at 130. Subsequent insurance by a mortgagee cannot affect a policy obtained by the mortgagor. Guest v. Fire Ins. Co., 66 Mich. 98. Prior insurance without the knowledge of the plaintiff is no breach of the other insurance clause. A

[When both parties knew of another policy in existence which was to be cancelled on the issuance of the second policy, and which was in fact cancelled the day after, the second was held not avoided.¹ Where a policy was to be void "if any subsequent insurance is effected in any other company," it is held that subsequent insurance means *further* insurance, and that a subsequent policy of the same amount as a prior policy which lapsed is not a breach of the condition.²] Substituted insurance, not increasing the amount, though changing it, is not new insurance;³ but it may be "subsequent" insurance, though less in amount.⁴ Nor is a renewal "other insurance,"

mortgagee insured, and afterward the mortgagor not knowing of the former policy insured *her* interest, stating the mortgage and that the mortgagee had a *right* to insure. It was held that her policy was good. *Carpenter v. Continental Ins. Co.*, 61 Mich. 635. A mortgagee insured his interest in the property by a policy payable to himself, and containing a stipulation for apportionment of loss in case of other insurance. Without his knowledge the mortgagor insured *his* interest by a policy payable to the mortgagee as his interest might appear. Upon loss he received payment from the latter policy, and then sued on the former, and it was held that he could recover in full. *Johnson v. North British & M. Ins. Co.*, 1 Holmes U. S. 117 at 119. Where a mortgagor assigned his policy to a mortgagee as collateral security, and then got other insurance, the mortgagee could recover on the policy. *Williams v. Warbasse*, 44 N. J. Eq. 89. In this case the mortgagee knew that the mortgagor was going to obtain other insurance, and the mortgagee promised to notify the company, but failed to do so, *query* could the mortgagee hold the mortgagee liable on his promise. But a mortgagor who takes out a policy payable to the mortgagee, and afterwards insures his own interest, avoids the first policy. Parol to show that the insured in the first policy was not the real party interested is inadmissible. *Lias v. Roger Williams Ins. Co.*, 8 Fed. Rep. 187; 1st. Cir. (N. H.) 1880, 9 Ins. L. J. 154; 10 Rep. 719. So where a mortgagee took out insurance, and the policy was made to the *mortgagors* payable to the mortgagee, and stipulated against other insurance, subsequent insurance by one of the mortgagors avoided the policy. The mortgagee was bound by his agreement. *Gillett v. Liverpool & L. & G. Ins. Co.*, 73 Wis. 203. The element of knowledge is not always conclusive. The existence of other insurance though unknown to the insured may avoid a policy, as where his policy contains a warranty that no other insurance exists. *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551. A policy issued to the mortgagee prohibited other insurance on a canal boat to exceed a certain sum. The owner procured such insurance, and it was held that the first policy was avoided. *Van Alstyne v. Ætna Ins. Co.*, 14 Hun, 360 at 364.]

¹ [Continental Ins. Co. v. Horton, 28 Mich. 173 at 177.]

² [Parsons v. Standard Fire Ins. Co., 5 Can. Supr. Ct. 233.]

³ *Pacaud v. Monarch Ins. Co.*, 1 L. C. Jur. 284.

⁴ *Burt v. People's, &c. Ins. Co.*, 2 Gray (Mass.), 397.

so as to require notice, if notice was given at the time of the original insurance,¹ unless, the interest meanwhile having changed, the renewal is in a new name.² The additional insurance must be valid. Subsequent insurance, void by its own terms, is no insurance within the meaning of the usual condition against other insurance, although the subsequent insurance be in fact paid.³ And a policy entered into by a mutual mistake of the parties as to prior existing insurance is not valid, and therefore not other insurance;⁴ but a policy issued by a company unauthorized to act in the State by reason of non-compliance with certain statutory regulations, is not a void policy.⁵ So if a prior insurance is void by reason of a violation of some other condition, its non-disclosure will not avoid a policy requiring notice of prior insurance.⁶ This doctrine is, however, denied by some most respectable authorities.⁷ In Georgia, by the Code, a second insurance, without

¹ *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6.

² *Continental Ins. Co. v. Heilman* (Ill.), 9 Ins. L. J. 91.

³ *Hardy v. Union Mut. Fire Ins. Co.*, 4 Allen (Mass.), 217; *Stacey v. Franklin Ins. Co.*, 2 W. & S. (Pa.) 506; *Jackson v. Mass. Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418; *Gale v. Belknap County Ins. Co.*, 41 N. H. 170; *Schenck v. Mercer County Mut. Ins. Co.*, 4 Zab. (N. J.) 447; *Philbrook v. New England Mut. Ins. Co.*, 37 Me. 137; *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520. [The condition against subsequent insurance is not broken by subsequent policies which never took effect because of breach of the condition as to absolute and sole ownership. An attempt to insure is not an insurance, and it makes no difference that the insurers regarded these after-policies as valid, and paid money on them to the insured. The rights of the parties on the policy here sued on became fixed at the time the loss occurred, and could not be affected by what was subsequently done between the insured and third persons. *Fireman's Ins. Co. v. Holt*, 35 Ohio St. 189, 195; *Thomas v. Builders' Ins. Co.*, 119 Mass. 121 at 123. Such decisions are outrageous violations of the spirit as well as the letter of the agreement made by the parties.]

⁴ *Wilson v. Queen Ins. Co.*, C. Ct. (Pa.), 10 Ins. L. J. 302; *Clark v. New England Mut. Ins. Co.*, 6 Cush. (Mass.) 842.

⁵ *Behler v. Germania Ins. Co.* (Ind.), 9 Ins. L. J. 778.

⁶ *Jackson v. Farmers' Mut. Ins. Co.*, 5 Gray (Mass.), 52; *McLacklin v. Aetna Ins. Co.*, 4 Allen (N. B.), 113. And see also *Neve v. Columbia Ins. Co.*, 2 McMullan (S. C.), 437. In Upper Canada; subsequent invalid insurance, if actually paid, has been held to work a forfeiture. *Dafoe v. Johnstown, &c. Ins. Co.*, 7 U. C. (C. P.) 55; *Gauthier v. Waterloo Ins. Co.*, U. C. (Q. B.), 16 Can. L. J. 29 (1880). But the law is otherwise here. *Fireman's Ins. Co. v. Holt* (Ohio), 9 Ins. L. J. 212, and cases before cited in this note.

⁷ *Bigler v. New York Central Ins. Co.*, 22 N. Y. 402; *Campbell v. Aetna Ins.*

consent of the first insurers, avoids the policy ; and it is there also held that a second insurance, though invalid, avoids the policy.¹ A distinction has, however, been taken between a policy apparently securing over-insurance which was void at the time of the loss, in which case recovery may be had, and a like policy which is voidable only by reason of some breach of condition which works a forfeiture, but which forfeiture has been waived, in which case the over-insurance is at the time of the loss an existing fact, and a recovery cannot be had.² In *Atlantic Insurance Company v. Goodall*,³ it was held that, where a policy was upon condition to be void if other insurance should not be indorsed on it, the existence of prior insurance did not make it absolutely void, but voidable only, and that it might be confirmed and made valid by acts of the company, showing a waiver of the defect ; and in *New England Fire Insurance Company v. Schettler*,⁴ it was held that if the other insurance had ceased by its own limitation, before the loss claimed under a subsequent policy, the right of recovery on the last policy would not be affected. In *David v. Hartford Insurance Company*,⁵ it was held that a policy securing subsequent insurance, upon its face valid, and the amount of which upon a loss happening had been paid, constituted additional insurance within the meaning of the condition, although it might have been avoided by extrinsic evidence of a forfeiture for condition broken ; and in *Mitchell v. Lycoming Mutual Insurance Company*,⁶ the rule was stated thus : When

Co., *Cochran*, vol. 3, p. 1 (*Nova Scotia*), 21 ; *Ramsay, &c. v. Mut. Fire Ins. Co.*, 11 U. C. (Q. B.) 516.

¹ *Lackey v. Georgia Home Ins. Co.*, 42 Ga. 456, 457. See also *Mason v. Andes Ins. Co.*, 23 U. C. (C. P.) 37 ; *Gros c. Le Nord*, *Dalloz*, Jur. Gén. 1870, 2, 70.

² *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. 402 ; *Carpenter v. Prov. Ins. Co.*, 16 Pet. (U. S.) 495 ; *Jacobs v. Equitable Ins. Co.*, 19 U. C. (Q. B.) 250, 257 ; *Obermeyer v. Globe Ins. Co.*, 43 Mo. 573. [If there is a prior policy the conditions of which have been broken, but which has not been cancelled by the company, it is error to rule that such former policy is not a breach of the conditions of the new policy against other insurance. The breach of the former policy rendered it voidable only, not void. *Landers v. Watertown Fire Ins. Co.*, 86 N. Y. 414.]

³ 35 N. H. 328 ; *Fishbeck v. Phoenix Ins. Co. (Cal.)*, 11 Repr. 218.

⁴ 38 Ill. 166. See also *ante*, § 101.

⁵ 13 Iowa, 69.

⁶ 51 Pa. St. 402, 408.

policies, alleged to be for other insurance, are void at the time of the loss, they are no obstacle to a recovery on the policy on which the claim is made; but if voidable only for some breach of condition for which the insurers might have avoided them, but which nevertheless they have waived, double insurance exists. In Kentucky, where the first policy was to be void if there was further insurance, and there was further insurance, to be void if prior insurance had been obtained, the first policy is held to be void on the obtaining new insurance, and the second policy only voidable at the option of the insurer.¹ This subject was also much discussed in a case in Iowa,² where there were two policies on the same property, each having a condition against both prior and subsequent insurance. The opinion of the majority of the court³ upon this point was given by Beck, J., who, after stating the conclusions of the court upon two preliminary questions, — first, that the policy of the Hartford company was prior in date, and second, that the receipt given by the agent of the Phoenix company amounted to a contract of insurance upon the usual terms and conditions as expressed in the policy, which the agent was empowered to issue, — thus proceeds: —

“The policy which is the foundation of this action contains a condition in the following words: ‘If the assured shall have, or shall hereafter make, any other insurance upon the property hereby insured, without the consent of the company written hereon, in such case this policy shall be void.’ As a defence the defendant alleges that, in violation of the condition, the insured, Howe, did cause the property to be insured by a policy issued by the Phoenix Insurance Company, Jan. 21, 1867. The policy sued on is dated Jan. 19, 1867.

“It appears from the evidence that Howe applied to the

¹ *Suggs v. Liverpool, &c. Ins. Co.*, 9 Ins. L. J. 657; *Baer v. Phoenix Ins. Co.*, 4 Bush (Ky.), 242.

² *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325, very similar to *Gale v. Belknap Ins. Co.*, 41 N. H. 170.

³ Miller, J., dissented, on the ground that when the policy was taken from the Phoenix office, there was no insurance in the other, and therefore it became void when the policy was received from the Hartford office the next day, there being then for the first time double insurance.

agent of the defendant on the eighteenth day of December, 1867, for insurance, and it was arranged that the policy should be issued and sent to him on that day. Howe not having received the policy from defendant's agent, nor heard from him in regard to the business, on the 21st of the same month applied to the agent of the Phoenix Insurance Company for a policy covering his property. The terms of the insurance were agreed upon; but the agent, having no blank policies, executed a receipt to Howe for the amount of the premium then paid him, specifying the property to be insured, which was the same covered by the policy issued by defendant, and stipulating that a policy would be issued as soon as the blanks should be received. The agent of the Phoenix company was not informed by Howe of his application to defendant's agent for insurance; and it appears that Howe, at the time, did not expect to receive the policy of the defendant, as it had not been sent to him, according to the prior arrangement. On the 22d, the day subsequent to the transaction with the agent of the Phoenix company, the agent of the defendant delivered to Howe the policy sued on, dated on the 18th, and received payment of the premium. Howe did not inform him of his transaction with the Phoenix company. The property covered by these policies was destroyed by fire on the 26th. Under these facts defendant insists that the transaction with the Phoenix Insurance Company is in violation of the conditions of the policy against other insurance quoted above, and that defendant's contract is avoided thereby. The question here presented is of very great difficulty; and its solution, either upon principle or authority, is not entirely free from doubt. . . . We now have the case of two policies, given at different dates, covering the same property, each having a condition against other insurance, both prior and subsequent, and providing that a breach thereof shall avoid the respective instruments. The question for us to determine is which, if either, of these instruments is valid, and which is avoided by the operation of a breach of the condition.

“ It will be remembered that a breach of the condition does

not absolutely render void and of no effect the policy; it simply renders it voidable,—its binding force and effect being subject to be defeated at the option of the company issuing the instruments. If no objection be made by the company on account of the breach of the condition, the policy may be enforced as though no forfeiture had ever happened. The act of the company, whereby it is shown that the instrument is treated as avoided, must be shown in order to defeat recovery thereon. If no such act or objection on the part of the company be shown, the contract will be considered binding.¹ It is not necessary here to state what will amount to an act avoiding the contract, or when it must be done, further than to observe that it must appear that the underwriter relied upon the breach of the condition to defeat the contract.

“Of course the company issuing the subsequent policy could not rely upon the breach of the condition in order to avoid the instrument until knowledge thereof was acquired; and its acts treating the policy as avoided would be sufficient, if shown to have been done after such knowledge. The same principles will apply to the prior policy. It was not absolutely void on account of the subsequent insurance, but was voidable only. It was a binding instrument when executed, and would so continue until some act done by defendant intended to avoid it, on account of the breach of the condition against the subsequent insurance. But it could not be avoided on account of the Phoenix policy, unless that instrument itself was valid. If it so happened that when the action was brought on defendant's policy, or even at the trial, it was made to appear that the Phoenix policy could not be enforced, being avoided on account of the breach of condition therein, it is obvious that the existence of that instrument, shown to be in operation, would not constitute a breach of the condition in defendant's policy against subsequent insurance. That condition is against actual insurance to be subsequently

¹ See also upon this point *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 195; *Canada Landed, &c. Co. c. Canada Agr. Ins. Co.*, 17 Grant's Ch. (U. C.) 418; *Comp. du Phoenix c. Dohis*, Dalloz, Jur. Gén. 1844, 4, 36; *Anson v. Winnesheik Ins. Co.*, 23 Iowa, 84; *post*, § 372.

made. The Phoenix policy created no insurance; it was avoided by the act of the company, and therefore did not constitute a breach of defendant's policy. The general principle of law may be stated as follows: In order to avoid a policy on account of a subsequent insurance against an express condition therein, it must appear that such subsequent insurance is valid, and that the policy upon which it is made is capable of being enforced. If it cannot be enforced, it is no breach of the prior policy. . . . The doctrine which we have assumed does not go to the full extent of some of the cases just cited.¹ It is held in *Philbrook v. New England Mutual Insurance Company* that the prior policy is valid, even though the subsequent policy is not avoided by the underwriter issuing it, but the loss thereon is paid; and in others of these cases, the rule is not expressly based upon the fact that the subsequent policy was treated by the underwriter issuing it as avoided.

"The doctrine which we recognize here is based upon the fact that the subsequent policy was treated and considered as avoided by the company issuing it as soon as it had notice of the prior insurance. In our view this is a most important consideration; for, if the underwriter in the second policy does not treat it as avoided, it cannot be so considered by the insured, or the company issuing the prior policy. The condition against prior insurance in the subsequent policy is for the benefit of the insurer, who may, at his option, waive it or insist upon enforcing its terms. If he seeks to enforce the condition, and treats the policy as a void contract, it is indeed difficult to see upon what grounds it may be regarded as valid, as an insurance that will defeat the prior policy. In this view, our conclusion is not in conflict with *David v. Hartford Insurance Company* and *Bigler v. New York Central Insurance Company*. In the first of these cases an action was brought upon a policy containing a condition against subsequent insurance. Other insurance, taken after the date of the policy, was relied on to defeat it. The plaintiff claimed that the

¹ The cases of *Gale*, *Schenck*, *Stacey*, *Philbrook*, *Clark*, and of the two *Jacksons*, cited *supra*.

subsequent policies, on account of certain conditions therein which were violated, were void. It was held that these policies are not void, but, on account of the breach of these conditions, might have been avoided. As they were treated as valid contracts by both of the parties thereto, the losses occurring thereon having been paid by the companies executing the subsequent policies, the breaches of the conditions were regarded as waived, and the instruments held to be binding upon the respective underwriters. The argument supporting the conclusion reached by the court may not entirely accord with the reasoning we have above adopted, but the result reached, we believe, is not inconsistent with the views herein expressed. *Bigler v. New York Central Insurance Company* in its facts very nearly resembles that case, the underwriter taking the subsequent risk having waived the forfeiture and paid the loss under the policy. There are arguments and positions taken in the opinions in this case which are not consistent with the views we have adopted. They reach further than the mere support of the conclusion arrived at upon the facts involved in the case, the Court of Appeals holding (two justices dissenting) that the first policy would be defeated even though the second was utterly void. This point was not in the case. While we may not be inclined to dispute the conclusion arrived at upon the facts presented, which we think not at all in conflict with our views, we cannot assent either to the reasoning adopted by the court, or the conclusions reached upon facts not before it for adjudication.

“*Carpenter v. Providence Washington Insurance Company*¹ is cited in support of the rule that where there are two insurance policies, both containing conditions of avoidance on account of other prior or subsequent insurance without notice, the first may be avoided on account of the second insurance. This case, we have observed, is often cited in support of this rule, and was so in the two cases just referred to. If such a rule be found in the case, — but it does not so appear to us, — its annunciation was not called for by the facts before the

¹ 16 Pet. (U. S.) 495.

court and made the basis of the decision. The policy upon which the suit was brought is considered in the opinion the second instrument, and the court holds that it was defective by a condition therein against prior insurance which in fact existed when it was issued.¹ The conclusion arrived at, we think, is not in conflict with the course of argument adopted by us, and the result reached in this case. The argument, however, adopted by the court in reaching the conclusion is hardly consistent either with our reasoning or its results. But inasmuch as the facts are dissimilar to those before us and the point ruled not necessarily in conflict with our decision, the case cannot be regarded as an authority against the principles we herein recognize."²

Insurance effected by a valid interim receipt is also other insurance.³ When other insurance was applied for and an interim receipt given, binding the company till notice of repudiation, which was not given till after a fire had occurred and in ignorance of it, the failure to give notice of this receipt was held to avoid a prior policy conditioned to be void on subsequent insurance without notice.⁴ But a contract for a "regular policy" means only that other insurance shall be indorsed when the regular policy shall issue.⁵ Further insurance by "said insured or assignees," means assignees of the policy, and not of the property.⁶ [If A. and B. jointly insure their

¹ 16 Pet. (U. S.) 500.

² See also *Allison v. Phoenix Ins. Co.*, U. S. C. Ct. (Iowa), Dillon, J., 4 Ins. L. J. 198, where the doctrine of Hubbard's case is adopted, after a careful review of all the cases. *Sutherland v. Old Dominion, &c. Ins. Co.*, 31 Grat. 176; *Knight v. Eureka, &c. Ins. Co.*, 26 Ohio St. 664; *Gale v. Insurance Co.*, 41 N. H. 170. To avoid any question upon this point some policies provide that other insurance, "whether valid or not," shall avoid the policy; and this provision has been frequently recognized by the courts as effectual. *Lackey v. Georgia Ins. Co.*, 42 Ga. 456, 459; *Liverpool, &c. Ins. Co. v. Verdier*, 35 Mich. 395; *Bigler v. New York Central Ins. Co.*, 22 N. Y. 96; *Continental Ins. Co. v. Heilman* (Ill.), 9 Ins. L. J. 91. But in *Gee v. Cheshire, &c. Ins. Co.*, 55 N. H. 65, the court held that a nugatory contract was no contract at all, and that such a condition was repugnant, and inconsistent with the scope and purpose of the contract.

³ *Hatton v. Beacon Ins. Co.*, 16 U. C. (Q. B.) 316.

⁴ *Bruce v. Gore, &c. Ins. Co.*, 20 U. C. (C. P.) 207.

⁵ *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345.

⁶ *Bates v. Commercial Ins. Co.*, Superior Ct. (Cincinnati), 4 Ins. L. J. 716;

mules, which are sometimes kept in a barn belonging to B. alone, by the burning of which they were destroyed, and B. had a policy on this barn and contents, this is a breach of the condition against other insurance.^{1]}

§ 365 *a*. **Simultaneous Policies Insurance** "to be made;" **Assignee having Prior Insurance.** — If the policy provides that it shall be void if any other insurance be made, reference is had only to subsequent insurance;² and if two policies are made out and delivered simultaneously by two companies, co-operating together, the clause in either policy requiring notice of prior or subsequent insurance can have no application.³ One of two policies, however, issued at the same hour by companies not co-operating, is not to be presumed prior or subsequent, nor are they both to be presumed to have been issued simultaneously. The safe course is to resort to reciprocal notices.⁴ And where the same agent negotiates several policies, he should give notice to all the companies,⁵ unless they may be presumed to be concurrent in point of time,⁶ or unless, as seems to be the reasonable rule, notice to the agent is notice to all his principals, and a waiver of indorsement.⁷ In France the rule is that where two policies are taken out simultaneously by the same agent of different companies, each is held to have notice of the other insurance, and the respective companies must contribute *pro rata*.⁸ And it has been held that when a party who already has insurance takes by

Holbrook v. American Ins. Co., 1 Curtis C. Ct. (Mass.) 193; *Wilson v. Hill*, 3 Met. (Mass.) 66. Held however, to apply to the assignee of the property also, in *Dickson v. Provincial Ins. Co.*, 24 U. C. (C. P.) 157; *Hendrickson v. Queen Ins. Co.*, 31 U. C. (Q. B.) 547.

¹ [*Horridge v. Dwelling-House Ins. Co.*, 75 Iowa, 374.]

² *Mussey v. Atlas Mut. Ins. Co.*, 4 Ker. (N. Y.) 79.

³ *Washington Fire Ins. Co. v. Davison et al.*, 30 Md. 91. And see *post*, § 370.

⁴ *Manhattan Ins. Co. v. Stein*, 5 Bush (Ky.), 652.

⁵ *Insurance Co. of North America v. McDowell*, 50 Ill. 120.

⁶ *Farmers' &c. Ins. Co. v. Taylor*, 73 Pa. St. 342.

⁷ *Kenton Ins. Co. v. Shea*, 6 Bush (Ky.), 174; *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6; *Insurance Co. of North America v. McDowell*, *supra*; *Shurtleff v. Phoenix Ins. Co.*, 57 Me. 137. See also *post*, § 370; *Richmond v. Niagara, &c. Ins. Co.* (N. Y.), 9 Ins. L. J. 117.

⁸ *L'Agricole c. Chaumiere*, Jur. Gén., Ct. of Cass., Dalloz, 1867, 5 Ass. 28.

assignment a policy requiring notice of prior insurance, a failure to give notice of the prior insurance will avoid the policy.¹ [When two policies are executed concurrently, each to be void by prior insurance, the assured may sue on either. But parts of a day are taken into account in such a case, and the companies may show the precise time of execution.²]

[§ 365 B. **The Problem of Two Policies each containing a Condition against Other Insurance**, has worried the judges a great deal, as is apparent on reading this, the following, and the two preceding sections. Almost every conceivable solution has been adopted in some jurisdiction or other, and there hardly exists in the law a more variegated chapter than this. The question whether a policy is void by other insurance depends on the validity of the other insurance, and this must be decided upon the face of the policies and the facts at the date of issuance of over-insurance and not at the date of the loss. It is error to tell the jury that the insurance which would come within the condition of over-insurance, must be insurance valid at the time of loss.³ If there is no *valid* other insurance at the time of the loss the policy is not void. The question is not whether the other policy is void on its face, but whether on all the facts it is really an existing valid insurance.⁴ If the subsequent policy is void on its face it does not constitute other insurance, but if extrinsic facts such as the existence of prior insurance must be shown to bring out its invalidity, and it has been accepted by the insured as additional insurance, and held by him as a subsisting policy at the time of loss, it constitutes a breach of the condition in the

¹ *Leavitt v. Western Mar. & Fire Ins. Co.*, 7 Rob. (La.) 351; *Walton v. La. St. Mar. & Fire Ins. Co.*, 2 id. 563. But see *Vose v. Hamilton, &c. Ins. Co.*, 39 Barb. (N. Y.) 302.

² [*Potter v. Marine Ins. Co.*, 2 Mason, 475 at 477.]

³ [*Equitable Ins. Co. v. McCrea, Maury, & Co.*, 8 Lea (Tenn.), 541, 547.]

⁴ [*Dahlberg v. St. Louis Mut. Ins. Co.*, 6 Mo. App. 121, 126, citing *Jackson v. Mass., &c. Ins. Co.*, 23 Pick. 423; *Stacey v. Franklin, &c. Ins. Co.*, 2 Watts & S., 544; *Clark v. N. E., &c. Ins. Co.*, 6 Cush. 342; *Hardy v. Union, &c. Ins. Co.*, 4 Allen, 217; *Gale v. Belknap Ins. Co.*, 41 N. H. 170; *Philbrook v. Insurance Co.*, 37 Me. 137; *Obermeyer v. Globe Ins. Co.*, 43 Mo. 573; and opposing the strong cases, *Bigler v. Insurance Co.*, 22 N. Y. 402, and *Carpenter v. Providence Wash. Ins. Co.*, 16 Pet. 510.]

prior policy.¹ A condition against other insurance is broken by procuring another policy, good on its face, though void by reason of false representations and by reason of the prior insurance.² When both policies declare that other insurance shall avoid them, the second does not avoid the first, for it never effected any insurance.³ So in New York, when a policy provided that if the assured should have any other insurance on the premises not consented to, &c., it should be void; and when the assured had at the time another policy on the same premises which provided that if any other insurance should be put on, &c., it should be void; it was held (one judge dissenting) that the first policy was void and the latter good.⁴ A Michigan case holds the second policy good, the first being void instantly the second is taken.⁵ In this case, however, the agent negotiating the second knew of the first policy. In a subsequent case it was held that if the first policy is in effect at the time of obtaining the second, the latter is avoided, for it is obtained in direct violation of one of the conditions on which its validity rests.⁶ The effect of subsequent insurance depends upon its validity, and this upon the action of the company in reference to it. If the second company waive the breach and pay the loss, the first policy is void, but if the second company avoid their policy, the first is good.⁷ If a policy is to be void by other insurance "valid or otherwise," the fact that subsequent policies may be void will not prevent forfeiture.⁸ It has been held that the clause against other insurance "valid or not," is not violated by a prior policy which had become absolutely void by its terms.⁹ It is difficult to see why the words "valid or not" do not in all common sense cover a void policy.]

¹ [American Ins. Co. v. Replogle, 114 Ind. 1.]

² [Funke v. Minn. Farmers' Mut. Fire Ins. Ass., 29 Minn. 347.]

³ [Jersey City Ins. Co. v. Nichol, 35 N. J. Eq. 291 at 299.]

⁴ [Landers v. Watertown Fire Ins. Co., 19 Hun, 174 at 178, Learned, P. J., dissenting.]

⁵ [Emery v. Mut. City, &c. Fire Ins. Co., 51 Mich. 469.]

⁶ [Keyser v. Hartford Fire Ins. Co., 66 Mich. 664, 667, Sherwood, J.]

⁷ [Hubbard v. Hartford Fire Ins. Co., 33 Iowa, 325, 329, 331.]

⁸ [Sugg v. Insurance Co., 98 N. C. 143.]

⁹ [Stevens v. Citizens' Ins. Co., 69 Iowa, 658.]

[§ 365 C. **The True View.** — In spite of all the shortsightedness and dreams of the courts in respect to this interesting topic there is some good authority for what is beyond question the view that accords with the fundamental purposes and principles of insurance, viz., that the real test (warranty aside) is the condition of the insured's motive for the preservation of the property. If he thinks he has double insurance, the very evil the company intended to avoid exists. If such is the state of facts at the time of insurance his bad faith should avoid the policy though the other insurance be afterward removed before loss, but if the other insurance occurs after the policy in question was taken out and was removed from the field entirely, before loss, then the insured should recover as in case of temporary breach of any other condition, unless the agreement of the parties is clearly to the effect that the mere act of *taking out* other insurance shall be fatal. The condition against other insurance is broken and the policy avoided by a subsequent policy, although the latter contains a similar condition. The clause was intended to prevent the insured from taking out other insurance which he supposes is good, and it makes no difference whether it is really valid or not. Under the rule adopted by the current of authority that this condition is only broken by other insurance valid at the time of loss, if the ground of avoidance is waived and the money paid by the second company, the courts are compelled to allow the insured to collect the double insurance against which the condition was intended to guard.¹ The taking out of a subsequent policy whether voidable or not, and whether actually resisted or not, is a breach of the condition against other insurance, and fatal.² So in a late case in Kentucky, it

¹ [Somerfield v. Insurance Co., 8 Lea (Tenn.), 547, 550.]

² [Turner v. Meriden Fire Ins. Co., 16 Fed. Rep. 454; 22 Am. L. Reg. U. S. 275, 1st Cir. (R. I.), 1883, citing, as cases that hold first policy good if second is invalid at time of loss, even though the second company may waive the breach and pay the loss, 119 Mass. 121; 23 Pick. 418; 6 Cush. 342; 4 Allen, 217; 65 Me. 368; 37 Me. 137; 55 N. H. 65; 41 N. H. 170; 4 Zab. 447; 35 N. J. Eq. 291; 2 Watts & S., 506; 8 Ins. L. J. 181; 35 Ohio St. 189; 26 Id. 664; 20 Ind. 520; 3 Dill. 480; and as cases that a subsequent policy, whether enforceable or not, works a forfeiture, 8 Lea, 547; 15 Repr. 114; 9 Ins. L. J. 657; 30 La. An.

was held that the condition is broken although the subsequent insurance is void.¹ So in Tennessee² and in Indiana, where at the issue of the policy in suit conditioned to be void by other insurance, there was a prior policy containing a similar provision, it was contended that the prior policy was avoided by taking out the one in suit, and therefore did not break the condition of the latter. The court remarked that the only reason of such conditions was to take away the motive which the insured might otherwise have for the destruction of his property. "Such being confessed by the purpose of the contract, it is not perceived how its object is in any degree promoted by the conclusion that notwithstanding the insured may have intended to secure over-insurance, and may have firmly believed he had succeeded in doing so, it is only where the attempt is actually successful, that the prohibitory condition is operative. It might be said with much reason that such a construction defeats the purpose of the provision, and renders it practically nugatory. Moreover, to hold that only such other insurance as is not void, and cannot be avoided by extraneous facts, is within the prohibition of the contract, affords the opportunity for the anomalous spectacle of an insured avoiding the effect of apparent over-insurance and compelling payment of one policy by exhibiting his own turpitude in obtaining another."³ In this case the policy was to be void by other insurance "whether valid or not," but the court does not confine itself to that ground. If the prior policy has been avoided by an alteration increasing the risk, and such is understood to be the fact, the old company refusing the new risk, the new policy is not void for other insurance.⁴ Subsequent insurance that is invalid, and is so treated by the

1368; 42 Ga. 456; 2 N. Y. 402; 86 N. Y. 414; 16 Pet. 495; 19 U. C. (Q. B.) 250; 11 Id. 516; 37 U. C. (C. P.) 47; 8 Lea, 531; Id. 541; and the case in 33 Iowa, 325, to the effect that the question of recovery on the first policy turns on the question whether the second has been in fact avoided.]

¹ [Stevenson v. Phoenix Ins. Co., 83 Ky. 7.]

² [Somerfield v. State Ins. Co., 8 Lea (Tenn.), 547 at 551.]

³ [Phoenix Ins. Co. v. Lamar, 106 Ind. 513, 515.]

⁴ [Leibrandt, &c. Co. v. Fireman's Insurance Co., 35 Fed. Rep. 30 (Md.), 1888.]

company is no breach.¹ But where there is a warranty that there is no other insurance valid or invalid, and that such will avoid the policy, evidence will not be received to show that the plaintiff *thought* there was no other insurance.² "Warranted no other insurance" means that there shall be none during the continuance of the risk.³

§ 366. **Identity of Interest.** — When it is said that the insurance, in order to come within the prohibition, must be the same, it is not meant that it is the same in all respects; *i. e.*, that the description of the subject-matter of insurance be the same in both. It is enough if the subsequent insurance covers a part of the interest embraced in the prior insurance, as when an undivided half of a house, or a part of the goods already insured, is covered by the new insurance;⁴ or the subject-matter of the subsequent insurance embraces the property covered by the prior insurance and other property besides.⁵ Thus, removing goods located in one store already insured into another store, having its goods insured in another policy which covers accruing goods, though both lots of goods belong to the same person, is a case of double insurance.⁶ If, however, after removal a policy is obtained upon the removed goods, which by its terms might cover part of the goods already there and insured, that this would not necessarily be double insurance may be shown by facts and circum-

¹ [Behrens v. Germania Fire Ins. Co., 64 Iowa, 19.]

² [Zinck v. Phoenix Ins. Co., 60 Iowa, 266.]

³ [Butler v. Merch. M. Ins. Co., 5 Russ. & Geld. (Nova Scotia), 301, (McDonald, C. J. dissenting.)]

⁴ Columbus Ins. Co. v. Walsh, 18 Mo. 229; Liscom v. Boston Mut. Fire Ins. Co., 9 Met. (Mass.) 205; Mussey v. Atlas Mut. Ins. Co., 4 Ker (N. Y.), 79; Associated Fire Ins. Co. v. Assum, 5 Md. 165; *ante*, § 365; Ogden v. East River Ins. Co., 50 N. Y. 389, overruling Howard Ins. Co. v. Scribner, 5 Hill (N. Y.), 298; Pitney v. Glens Falls Ins. Co., 69 N. Y. 6; Phoenix Ins. Co. v. Michigan, &c. R. R. Co., 28 Ohio St. 69.

⁵ Ramsay, &c. v. Mutual Fire Insurance Co., 11 U. C. (Q. B.) 516; McMahon v. Portsmouth Fire Insurance Co., 2 Fost. (N. H.) 15; Shannon v. Gore Dist. Ins. Co., 2 Ont. App. Rep. 396. *Contra*, Sloat v. Royal Insurance Co., 49 Pa. St. 14.

⁶ Walton v. La. St. Mar. & Fire Ins. Co., 2 Rob. (La.) 563; Washington Ins. Co. v. Hayes, 17 Ohio St. 432. *Contra*, Vose v. Hamilton Mut. Ins. Co., 39 Barb. (N. Y.) 302.

stances outside the policy, showing that such was not the intention.¹

The somewhat peculiar case of *Hough et al.*, Appellants, *v.* People's Insurance Company² was this: The Baltimore Warehouse Company, which received goods on storage, and issued receipts or certificates therefor to the depositors, effected an insurance in the Associated Firemen's Company for \$10,000 against loss by fire for one year, "on merchandise generally, hazardous or extra-hazardous, held by them or in trust," contained in a particular warehouse; they also took out a policy in the Home Insurance Company, to the amount of \$20,000, "on merchandise, hazardous or extra-hazardous, their own, or held by them in trust, or in which they had an interest or liability," contained in the same warehouse. The appellants, on the 20th of June, 1870, deposited fifteen bales of cotton in the same warehouse, and received a receipt or certificate therefor from the warehouse company, and on the same day procured a policy of insurance on the cotton so deposited from the appellee. On the 27th of June they deposited thirteen bales, for which a like receipt was given, and on the same day they effected an insurance for the cotton with the appellee. Under the policies issued to the appellants, the loss, if any, was payable to the Baltimore Warehouse Company. The appellants had other cotton to a large amount stored with the warehouse company. The warehouse company advanced to the appellants over \$48,000 upon the cotton belonging to them, and stored in the warehouse. In the policies to the appellants, as well as in those to the warehouse company, it was stipulated that in case of loss the assured should not be entitled to recover on such policy any greater proportion of the loss or damage sustained to the subject insured than the amount thereby insured should bear to the whole amount of the several insurances thereon. On the 18th of July, 1870, the warehouse was burned, and of the cotton stored therein some of the bales were saved, some were partially

¹ *Mauger v. Holyoke Ins. Co.*, C. Ct. (Mass.), 1 Holmes, 287; s. c. 3 Ins. L. J. 55. See also *Whitwell v. Putnam, &c. Ins. Co.*, 6 Lans. (N. Y.) 166; *post*, § 367; *Pitney v. Glens Falls Ins. Co.*, 69 N. Y. 6.

² 36 Md. 398.

destroyed, and others totally destroyed. In an action by the appellants, for the use of the warehouse company, on the policies of insurance issued by the appellee, upon these facts it was held that the policies sued on, having been made payable to the warehouse company, inured to the benefit of the company, and might be considered as in favor of the same assured, on the same interest, the same subject, and against the same risks as the policies which were issued directly to the warehouse company, and with the latter policies constituted a double insurance; and the companies therefore issuing the policies were bound to contribute their respective portions of the loss.¹ Where, however, a warehouseman insures goods, "his own, in trust or on commission," with the understanding that his policy covers "anything under his care," and afterwards receives into his warehouse wheat already covered by a floating policy, — which, however, expired before the fire, — this was held to be no double insurance, and the warehouseman and the owner of the wheat were allowed to maintain a joint action for the value of the wheat, the warehouseman having been previously paid for the loss on his other goods.² Nor is insurance of the whole of the property by the owner who has agreed to sell one-half, and to pay one-half the proceeds in case of loss to the vendee, double insurance "by any other person at the same time."³ But where a ship was insured "for account of owners, as interest may appear," and two of the owners afterwards procured insurance, this was held to be other insurance.⁴ And insurance upon the same life, applied for by the same person, though payable to a different person from the payee in a second policy, is other insurance within the meaning of a proviso making a policy void if there be other insurance undisclosed.⁵ The interests of

¹ *Hough et al. v. People's Ins. Co.*, 36 Md. 398. See also *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527; *Sturm v. Atlantic, &c. Ins. Co.*, 63 N. Y. 77. And see *post*, §§ 436-438.

² *Phoenix Ins. Co. v. Hamilton*, 14 Wall. (U. S.) 504.

³ *Burbank v. Rockingham Ins. Co.*, 4 Fost. (N. H.) 550.

⁴ *Mussey v. Atlas Ins. Co.*, 4 Ker. (N. Y.) 79.

⁵ *Sparrow v. Mut. Ben. Life Ins. Co.*, C. Ct. (Mass.), Shepley, J., tried in April, 1873.

mortgagor and mortgagee are distinct, and therefore insurance by a mortgagee of his interest at his own expense is not within the prohibitory clause of a prior policy in favor of the mortgagor. If, however, such insurance is at the expense of the mortgagor, and for his benefit, it is within the clause.¹ But where the mortgagor was insured, loss payable to mortgagee, and the mortgage authorized insurance at the expense of the mortgagor in case of default by mortgagor, further insurance by the mortgagee before the mortgagor's default, and without his knowledge or consent, is not other insurance by the "assured."² [Where however, M. knows of prior insurance obtained by D., the policy issued to M. is void.³] The different interests of joint owners are likewise distinct.⁴

§ 367. **Other Insurance; Condition construed strictly.**— And this condition, like others working forfeitures, will be construed strictly. Thus, under a policy insuring a building, and prohibiting other insurance upon property "connected with it," insurance upon goods in the building is not other insurance within the meaning of the prohibition.⁵ And though the description of the property in the respective policies may cover, and apparently does cover, the same interests, it is a matter of evidence whether it does or not.⁶ So where the same person had three several policies issued by separate offices on "a stock of dry-goods contained in a four-story brick store," and afterwards obtained another policy from a different company on "a stock of merchandise contained in the chambers of a four-story brick and slated building," being the same building, it was claimed by the last company that as the goods lost were in the same building, they were liable only to their proportionate loss. But it being shown that

¹ *Holbrook v. American Ins. Co.*, 1 Curtis, C. Ct. (Mass.) 193.

² *Titus v. Glens Falls Ins. Co.* (N. Y.), 9 Ins. L. J. 664.

³ [*Doran v. Franklin Fire Ins. Co.*, 86 N. Y. 635.]

⁴ *Franklin Mar. & Fire Ins. Co. v. Drake*, 2 B. Mon. (Ky.) 47; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 518.

⁵ *Jones v. Maine Mut. Fire Ins. Co.*, 18 Me. 155; *Illinois Mut. Ins. Co. v. O'Neile*, 13 Ill. 89. And see *ante*, § 243.

⁶ *Stacey v. Franklin Ins. Co.*, 2 W. & S. (Pa.) 506; *Clark v. Hamilton Mut. Ins. Co.*, 9 Gray (Mass.), 148; *Neve v. Columbia Ins. Co.*, 2 McMullan (S. C.), 220; *ante*, § 365.

when the first three policies were issued the plaintiff did not occupy the chambers, and had no goods there,—evidence held admissible as explanatory of a doubt as to what goods the several policies might apply,—the defendants were held to be liable for the whole loss on the goods in the chambers. This in fact was no additional insurance, but was as much an independent risk as if the goods had been in a different building.¹

§ 368. **Notice; What sufficient; When and how to be given.**—Parol notice, and to a local agent, is sufficient, unless other notice be required.² Notice must be within reasonable time, and need not be till a reasonable time has elapsed. What would be a reasonable time is a question for the jury, if the facts are in dispute; otherwise it is a question of law for the court.³ Notice given seven months after the destruction of the property is not within reasonable time. An unexplained delay of nineteen days is unreasonable.⁴ Notice deficient or erroneous in some particulars which are not necessary unless inquired for, if the amount of the other insurance be correctly given, is sufficient;⁵ or even if it be incorrectly given, if the mistake does not prejudice the insurers who object, as where subsequent insurance is stated at too large an amount.⁶ And

¹ *Storer v. Elliot Fire Ins. Co.*, 45 Me. 175.

² *McEwen v. Montgomery County Mut. Ins. Co.*, 5 Hill (N. Y.), 101; *Schenck v. Mercer County Mut. Ins. Co.*, 4 Zab. (N. J.) 447; *Hendrickson v. Queen Ins. Co.*, 31 U. C. (Q. B.) 547; affirming s. c. 30 id. 108. Where further insurance is prohibited by law, the agent's consent is held to be no waiver in *Indiana. Behler v. German Ins. Co.*, 68 Ind. 347.

³ *Jacobs v. Equitable Ins. Co.*, 19 U. C. 250, 257; *Kimball v. Howard Fire Ins. Co.*, 8 Gray (Mass.), 33. In Canada it is said that no question of reasonable time arises; and when notice is due it is at the risk of the insured if he do not give it before a fire. *Weinaugh v. Provincial Ins. Co.*, 20 U. C. (C. P.) 405; *post*, § 370. The insured takes the risk if he adopt any other mode of notice than that provided for, as by sending through the mail, when the policy provides that the notice shall be "given to the secretary." *Plath v. Minnesota Ins. Co.*, 23 Minn. 479.

⁴ *Mellen v. Hamilton Fire Ins. Co.*, 17 N. Y. 609, affirming s. c. 5 Duer (N. Y. Sup. Ct.), 101.

⁵ *Benjamin v. Saratoga County Mut. Ins. Co.*, 17 N. Y. 415; *McMahon v. Portsmouth, &c. Ins. Co.*, 2 Fost. (N. H.) 15.

⁶ *Osser v. Provincial Ins. Co.*, 12 U. C. (C. P.) 133.

it seems that notice should be given, where the subsequent insurance is applied for a few days before the destruction of the property insured in the prior policy, but the policy is not delivered till after.¹ Consent induced after the act for which consent is to be had is sufficient.² Notice after the fire is sufficient, under a policy which specially authorizes subsequent insurance on notice in order that the subsequent insurance may be indorsed on the policy, though the by-laws printed on the back of the policy, and the charter, require that such notice be given and such insurance be indorsed on the policy on pain of forfeiture.³ It was held otherwise, however, where the policy simply required notice, without stating its object.⁴ [A condition that the insured must give notice of "any other insurance effected" applies to all other policies before or after the one in question.⁵ Notice of further insurance given to one formerly an agent of the company but who had given proper notice of his withdrawal, is not sufficient. It is the duty of the assured under such circumstances to know who is the agent.⁶ A condition that notice of other insurance must be given, is satisfied by notice of an *intention* to procure other insurance and the assent of the agent receiving the notice.⁷]

§ 369. **Other Insurance ; Notice in Writing ; Indorsement on Policy.**—In many policies the notice of other insurance is required to be in writing and indorsed on the policy. And it has formerly⁸ been frequently held to be essential that these

¹ *Inland Ins., &c. Co. v. Stauffer*, 33 Pa. St. 397 ; *ante*, §§ 365, 365 a.

² *Wheeler v. Watertown, &c. Ins. Co.* (Mass.), 10 Ins. L. J. 354.

³ *Soupras v. Mut. Fire Ins. Co.* (Sup. Ct. Montreal), 1 L. C. Jurist, 197.

⁴ *Western Ass. Co. v. Atwell*, 2 L. C. Jurist, 181.

⁵ [*Warwick v. Monmouth, &c. Ins. Co.*, 44 N. J. 83.]

⁶ [*Illinois Mut. Fire Insurance Co. v. Malloy*, 50 Ill. 419 at 421.]

⁷ [*N. O. Ins. Ass. v. Griffin*, 66 Tex. 232.]

⁸ [There is not lacking recent authority to the same effect. For example, it is held that where notice in writing is to be given of other insurance, mere knowledge of the agent is not sufficient. *Commonwealth Mut. Fire Ins. Co. v. Huntzinger*, 98 Pa. St. 41. And again where the policy provides that other insurance shall not be obtained without written consent, the parol acquiescence of the agent cannot avail the plaintiff. He is presumed to know the terms of his agreement, which give him notice that the agent possesses no such power. *Cleaver v. Insurance Co.*, 65 Mich. 527. When a policy prohibited further insur-

particulars should be literally complied with, and that verbal notice, or anything short of the notice and the formalities subsequent thereto required by the condition, would subject the delinquent to forfeiture. Thus where the insured, after procuring subsequent insurance, gave a memorandum of it to the agent of the company which issued the prior policy, to be entered on the records, the policy not being at hand, the agent saying that such entry would answer every purpose, and the agent afterwards told the assured that he had made the entry, it was held that the condition was violated.¹ The indorsement, it seems, is of the notice, and not of consent.²

ance except by consent of the company written on the policy, and the assured procured other policies, afterwards writing to the company's agent, asking about the same and receiving a reply offering to place him in other companies, and also saying, "We will of course allow other concurrent insurance, &c.," it was held that the policy was avoided, as its provisions had not been complied with. *Allemania Fire Ins. Co. v. Hurd*, 37 Mich. 11 at 13; *N. Y. Central Ins. Co. v. Watson*, 23 Mich. 486, 487, 488. Where the additional subsequent policy was shown to the agent, and looked at by him without comment, it was held insufficient to establish a waiver of the condition requiring written consent, and the former policy was held void. *Robinson v. Fire Ass.*, 63 Mich. 90, 95, (many cases cited during the argument to show that silence alone is not a waiver in such case). Mere verbal notice to the agent without indorsement will not be sufficient. *Western Ass. Co. v. Doull*, 12 Can. Supr. Ct. 446. Conversations between the assured and insurer, prior to, or at the time of the issuing of the policy, are inadmissible to prove waiver by an omission of the company to indorse on the policy prior insurance of which it had notice. *Madison Ins. Co. v. Fellowes*, 1 Dis. (Ont.) 217 at 223.]

¹ *Worcester Bank v. Hartford Fire Ins. Co.*, 11 Cush. (Mass.) 265. And see also *Conway Tool Co. v. Hudson R. Ins. Co.*, 12 id. 144; *Pendar v. American Mut. Ins. Co.*, id. 469; *Forbes v. Agawam Ins. Co.*, 9 Cush. (Mass.) 470; *Stark County Mut. Ins. Co. v. Hurd*, 19 Ohio, 149; *Carpenter v. Prov. Wash. Ins. Co.*, 16 Pet. (U. S.) 495; *Hale v. Mechanics' Mut. Ins. Co.*, 6 Gray (Mass.), 169; *Couch v. City Fire Ins. Co.*, 38 Conn. 181; *Carpenter v. Providence Ins. Co.*, 4 How. (U. S.) 185. Notice of intention to insure is not notice of insurance. *McCrea v. Waterloo County Mut. Ins. Co.*, 26 U. C. (C. P.) 431, 437; *Healey v. Imperial Fire Insurance Co.*, 5 Nev. 268. A mortgagee protected against forfeiture by a sale or transfer of the property, is also protected from its probable consequence — as from a further insurance — by the grantee, and need give no notice. *City Five Cents Savings Bank v. Penn Ins. Co.*, 122 Mass. 165; *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141.

² *Wakefield v. Orient Ins. Co. (Wis.)*, 10 Ins. L. J. 249. See also *Westlake v. St. Lawrence, &c. Ins. Co.*, 14 Barb. (N. Y.) 206.

§ 370. **Other Insurance; Notice; Consent in Writing.**— But the courts have become more liberal in favor of the assured in their construction of this sort of provision, whether it be contained in the charter or in the policy. While, as we have seen, the old rule required the consent to be in writing and indorsed on the policy, it is the decided tendency of the modern cases to hold that if the notice of the additional insurance be duly given to the company, or its agent, and no objection is made, the company will be estopped from insisting on a forfeiture of the policy, because their consent thereto was not indorsed, as literally required by the stipulation.¹ [When the company knew that its own agent was effecting additional insurance in another company, on property they had already insured, it was their duty to indorse consent, or express disapproval, and without doing one of these they could not set up the extra insurance as a defence.² The requirement that other insurance must be assented to in writing is valid, but may be waived by verbal assent of the agent with any facts that would make it unfair for the company to insist on the condition.³ If an agent whose duty it is to indorse on the policy subsequent insurance allowable under its terms, has knowledge of such insurance, but delays making the indorsement to suit his convenience, his conduct is a waiver of the condition requiring indorsement, and if a loss occur before indorsement the company is liable.⁴] An office which issues

¹ *Thompson v. St. Louis Mut. Life Ins. Co.*, 52 Mo. 469; *Hayward v. National Ins. Co.*, 52 id. 181, overruling *Hutchinson v. Western Ins. Co.*, 21 id. 97; *Horwitz v. Equitable Mut. Ins. Co.*, 40 id. 557; *Franklin v. Atlantic Fire Ins. Co.*, 42 id. 456; *Combs v. Ham. Sav. & Ins. Co.*, 43 id. 148; *Northup v. Miss. Val. Ins. Co.*, 47 id. 435; *Viele v. Germania Ins. Co.*, 26 Iowa, 9, 55; *Walsh v. Aetna Life Ins. Co.*, 30 id. 133; *Von Borries v. United Life, Fire & Mar. Ins. Co.*, 8 Bush (Ky.), 132; *Peck v. New London County Mut. Ins. Co.*, 22 Conn. 575; *Hatton v. Beacon Ins. Co.*, 16 U. C. (Q. B.) 316; *National Fire Ins. Co. v. Crane* (in equity), 16 Md. 260. See also *post*, §§ 376, 383, 387; *Hunt v. Hudson River, &c. Ins. Co.*, 2 Duer (N. Y. Superior Ct.), 481.

² [*Horwitz v. Equitable Mut. Ins. Co.*, 40 Mo. 557 at 560; *Pelkington v. Nat. Ins. Co.*, 55 Mo. 172 at 177; *Planters' Mut. Ins. Co. v. Lyons*, 38 Tex. 253 at 272.]

³ [*New Orleans Ins. Ass. v. Griffin*, 66 Tex. 232; *Morrison v. Insurance Co.*, 69 Tex. 353.]

⁴ [*America Cent. Ins. Co. v. McCrea, Maury & Co.*, 8 Lea (Tenn.), 573.]

a subsequent policy will be presumed to have notice of the prior one.¹ And where both policies are negotiated through the same person, who is agent for both companies, his knowledge is the knowledge of each company.² But the knowledge of or notice to the broker through which both insurances are effected, is not the knowledge of or notice to the insurers.³ [A consent in writing to other insurance is sufficient though not on the policy as its provisions require.⁴ If the required consent is obtained for another policy, this policy may be *renewed* without re consent.⁵]

§ 371. **Other Insurance; Approval; Consent.** — Where the approval of other insurance is required in writing, a letter from the secretary of the insurers, in reply to a notice from the insurer, and stating that he has received the notice of additional insurance, is an approval in writing within the meaning of the condition. Thus where, in case of further insurance, the insured is to give notice thereof to the company, and have the same indorsed on the policy, or otherwise acknowledged or approved by them in writing, and such insurance is obtained, notice whereof is immediately given to the secretary of the company, who acknowledges by letter the receipt of the notice, without more, it has been held that this is an approval in writing, or, at least, that after such notice the policy remains in force till the insurers signify their option to disapprove. Under a similar policy, which also provided that after notice of such further insurance the insurers should have the right to cancel upon payment of the *pro rata* portion of the premium for the unexpired portion of the time,

¹ *Barnes v. Union Ins. Co.*, 45 N. H. 21; *Horwitz v. Equitable Ins. Co.*, 40 Mo. 557; [*Russell v. State Ins. Co.*, 55 Mo. 585 at 591; *Richmond v. Niagara Falls Ins. Co.*, 79 N. Y. 230, 239.]

² *Von Bories v. United Life, &c. Ins. Co.*, 8 Bush (Ky.), 133. See also *Warner v. Peoria, &c. Ins. Co.*, 14 Wis. 318; *ante*, § 365 *a*.

³ *Mellen v. Hamilton Mut. Fire Ins. Co.*, 17 N. Y. 609, affirming *s. c.* 5 Duer (N. Y. Superior Ct.), 101; *McLachlan v. Ætna Ins. Co.*, 4 Allen (N. B.), 173. But see *Fishbeck v. Phenix Insurance Company*, 54 Cal. 422. And see also *post*, § 371.

⁴ [*Mattocks v. Des Moines Ins. Co.*, 74 Iowa, 233.]

⁵ [*New Orleans Ins. Ass. v. Holberg*, 64 Miss. 51.]

the insurers must either indorse or cancel. They cannot refuse to do both, and retain the whole consideration.¹ And where the consent of the directors is required, it need not be signified by formal vote, or even in writing, but may be inferred from the proof of other facts, as of their knowledge of all the facts, where two directors in one company, being also directors in another company, took the additional insurance. So if it be required that prior insurance be indorsed on the subsequent policy when it issues, leave to keep insured to an amount greater than is stated in the policy thus issued, indorsed on the policy, or by parol and by an agent even after the delivery of the policy, is the equivalent of such indorsement, as it may refer to prior as well as subsequent insurance.² So is the fact that the prior insurance is stated in the policy;³ so if other insurance is permitted without notice in the subsequent policy, this is a waiver of notice of prior or subsequent insurance.⁴ Assent to subsequent insurance is also assent to a renewal of the same, in the same or any other office.⁵ And notice of prior insurance in the application for a subsequent policy is notice of a renewal of the prior insurance.⁶ But in Massachusetts,⁷ in a case where the insurance was not a renewal strictly, but an insurance in another company, for a less amount, to take the place of an insurance which had been assented to, though for a less amount, it was held that the assent did not apply to the substituted insurance. But

¹ Demill v. Hartford Ins. Co., 4 Allen (N. B.), 341. And see *post*, § 372. Failure to dissent for an unreasonable time raises the presumption of assent. Shannon v. Hastings Mut. Ins. Co., 2 Ont. App. 81.

² Blake v. Exch. Ins. Co., 12 Gray (Mass.), 148; Philbrook v. New England Mut. Ins. Co., 37 Me. 137; Kimball v. Howard Fire Ins. Co., 8 Gray (Mass.), 33; Benedict v. Ocean Ins. Co., 1 Daly (N. Y. Sup. Ct.), 8; s. c. affirmed, 31 N. Y. 389; Warner v. Peoria Mar. & Fire Ins. Co., 14 Wis. 318; Carrugi v. Atlantic, &c. Ins. Co., 40 Ga. 135.

³ Baptist Soc. v. Hillsborough Mut. Fire Ins. Co., 19 N. H. 580; Ames v. New York Union Ins. Co., 14 N. Y. 253, 258; Parsons v. Queen Ins. Co., 43 U. C. (Q. B.) 271.

⁴ Frederick, &c. Ins. Co. v. Deford, 38 Md. 404.

⁵ Baptist Soc. v. Hillsborough Mut. Fire Ins. Co., 19 N. H. 580; Pechner v. Phoenix Ins. Co., 6 Lans. (N. Y.) 411.

⁶ Brown v. Cattaraugus County Mut. Fire Ins. Co., 18 N. Y. 385.

⁷ Burt v. People's Mut. Ins. Co., 2 Gray (Mass.), 397. But see *ante*, § 365.

notice of "changes in additional insurances" is sometimes required by the terms of the policy, and this applies where the aggregate insurance remains the same, but there is a change in the distribution amongst the subject-matters insured.¹ In *Sykes v. Perry County Mutual Fire Insurance Company*,² the distinction is taken between notice and knowledge of an alteration, at least so far as an agent is concerned, that while knowledge of the agent is not knowledge of the company, notice to the agent would be notice to the company. But knowledge of the agent of a fact existing at the time insurance is effected, is knowledge of the insurers.³ And this knowledge runs through all renewals of the same insurance.⁴

§ 372. **Other Insurance ; Permission in Policy ; Previous Consent ; Waiver of Forfeiture for Breach of Condition.** — But, as has already been seen,⁵ forfeiture by reason of a breach of the condition may be waived by any act of the insurers recognizing the validity of the policy after knowledge of a breach of the condition. A failure to give notice of such insurance, when in fact it is already known to the insurers themselves, or their agent, as where they have issued a prior but still outstanding policy on the same property, will not avoid the policy, the issue of the subsequent policy with knowledge being a waiver of the condition.⁶ And the acceptance of a renewal premium has the same effect.⁷ And if the company have a right to avoid after notice of breach, and neglect so to do for an unreasonable time, or by any act recognize the continued validity of the policy, it will be a waiver of the for-

¹ *Simpson v. Penn Fire Ins. Co.*, 38 Pa. St. 250.

² 34 Pa. St. 79. And see *ante*, § 370.

³ *People's Ins. Co. v. Spencer*, 53 Pa. St. 353; *Roberts v. Continental Ins. Co.*, 41 Wis. 321.

⁴ *Ibid.*; *Liddle v. Market Fire Ins. Co.*, 4 Bosw. (N. Y.) 179.

⁵ *Ante*, §§ 143, 365. See also *Hayward v. National Ins. Co.*, 52 Mo. 181, overruling *Hutchinson v. Western Ins. Co.*, 21 id. 97; *Elliott v. Lycoming Ins. Co.*, 66 Pa. St. 22.

⁶ *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Wash. Ins. Co. v. Davison*, 30 Md. 91; *Webster v. Phoenix Ins. Co.*, 36 Wis. 67.

⁷ *Carroll v. Charter Oak Ins. Co.*, 1 Abb. Ct. of App. Dec. 316.

feiture.¹ So will taking part in making the adjustment,² unless some act be done in the course of the attempted adjustment, inconsistent with an intention to recognize the existing validity of the policy, as, for instance, returning the unearned premium.³ If the policy on its face allows further insurance to a limited amount, this will be equivalent to consent in writing on the policy, and a renewal of a lapsed policy to the same amount is no violation of the condition against other insurance.⁴ Previous authority given by the secretary of an insurance company to effect further insurance without notice is a waiver of the condition in the policy requiring subsequent notice and approval by the company.⁵

[§ 372 A. **Waiver.** — Notice to a general agent of other insurance, and his assent, prevents forfeiture under the condition against other assurance without consent of the company,⁶ and if notice comes to such an agent, and no objection is made within a reasonable time, the breach of condition is waived. To allow the company to object after long silence would be to consummate a fraud.⁷ The agent of the company, with power to make and break contracts, is the proper person to give such consent, and in the absence of restriction known to the insured it will bind the company. But notice to a soliciting agent of breach of the condition as to other insurance is not

¹ *Von Bories v. United Life, Fire, & Mar. Ins. Co.*, 8 Bush (Ky.), 133, 135; *Lafleur v. Citizens' Ass. Co.*, Q. B. 22 L. C. Jur. 247; *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 195, affirming s. c. 6 Lans. 411; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6, affirming s. c. 61 Barb. 335; *Brandup v. St. Paul, &c. Ins. Co. (Minn.)*, 10 Ins. L. J. 228; *Hadley v. New Hampshire Ins. Co.*, 55 N. H. 110; *Smith v. Commercial Ins. Co.*, 33 U. C. (Q. B.) 69; *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660; *Sparrow v. Mut. Benefit, &c. Ins. Co., C. Ct. (Mass.)*, Shepley, J., 1873; *Kenton Ins. Co. v. Shea*, 6 Bush (Ky.), 174; *Fishbeck v. Phenix Ins. Co.*, 54 Cal. 422. The case of *Von Bories* is sharply criticised in 19 Am. Law Reg. 680. See also *post*, §§ 507, 508.

² *Levy v. Peabody Ins. Co.*, 10 W. Va. 560; *Fishbeck v. Phenix Ins. Co.*, 54 Cal. 422.

³ *Baer v. Phoenix Ins. Co.*, 4 Bush (Ky.), 242.

⁴ *Parsons v. Standard Fire Ins. Co. (Sup. Ct. Can.)*, 3 Legal News, Montreal, 335.

⁵ *Parsons v. Victoria Mut. Fire Ins. Co.*, 29 U. C. (C. P.) 22.

⁶ [*Goldwater v. Liverpool & L. & G. Ins. Co.*, 39 Hun, 176.]

⁷ [*Crescent Ins. Co. v. Griffin & Shook*, 59 Tex. 509. See § 370. *Carrugi v. Atlantic Fire Ins. Co.*, 40 Ga. 135 at 141.]

notice to the company, and will not base a plea of waiver.¹ A declaration of the agent to the assured referring to subsequent other insurance that his policy is all right, estops the company.² If the applicant tells the agent to notify the company that he intends to obtain other insurance, and the agent says it will not be necessary until such insurance is obtained, the company is estopped to deny liability on the ground that its policies forbid other insurance without its consent.³]

[§ 372 B. *Knowledge and long Silence or other misleading Action.*—Knowledge of subsequent insurance and conduct inducing the insured to believe the former policy is still regarded as binding is a waiver.⁴ Silence for an unreasonable time after knowledge of other insurance is a waiver.⁵ A delay of three months has been held sufficient.⁶ Where knowledge that other insurance has been effected comes to the agent, and the company by its long silence induces the insured to believe that the policy is still in force, it is estopped, although the policy declared that it should be void by other insurance without assent of the company written upon it.⁷]

[§ 372 C. *Knowledge of Agent at Issue of Policy.*—If at the time of insurance the agent knew of other insurance, and with this knowledge took the premium and issued the policy, the condition is waived.⁸ The knowledge of the general agent who had previously effected the other insurance is sufficient.⁹ When the assured stated to the agent that he had other insurance, and then signed an application made out by the agent stating that there was no other insurance, on which a

¹ [Queen Ins. Co. v. Young, 86 Ala. 424.]

² [Combs v. Shrewsbury Ins. Co., 34 N. J. Eq. 403.]

³ [Kitchen v. Hartford Ins. Co., 57 Mich. 135.]

⁴ [Martin v. Jersey City Ins. Co., 44 N. J. 273.]

⁵ [Phoenix Ins. Co. v. Spiers, 87 Ky. 285.]

⁶ [Planters' Mut. Ins. Co. v. Lyons, 38 Tex. 253 at 272.]

⁷ [Crescent Ins. Co. v. Griffin, 59 Tex. 509.]

⁸ [Lycoming Ins. Co. v. Barringer, 73 Ill. 230 at 235; North British, &c. Ins. Co. v. Steiger, 124 Ill. 81; Putnam v. Commonwealth Ins. Co., 4 Fed. Rep. 753; 18 Blatch. 368 (N. Y.), 1880; Lockwood v. Middlesex Mut. Ass. Co., 47 Conn. 553.]

⁹ [Richmond v. Niagara Fire Ins. Co., 79 N. Y. 230 at 239.]

policy was issued, it was held that the company was estopped from setting up the prior insurance as a defence.¹ But the company is not estopped because the agent by due diligence might have discovered the existence of other insurance at the time of issue. It must be shown that, as a matter of fact, he did actually know of its existence.^{2]}

[§ 372 D. *No Waiver*. — Mere knowledge of the agent that other insurance is effected, there being no premiums subsequently received, or other misleading action, is not a waiver.³ Taking additional assurance avoids a policy conditioned against it, though the insured did not know of the condition, and although he told the agent he had taken other insurance but did not name the amount, and the agent had previously offered further insurance to a less amount than the additional policy, and although proofs of loss were demanded after knowledge of other insurance, but without knowledge of the amount.⁴ When the application for insurance stated that other insurance on the same property would expire in two months, and would not be renewed, and the policy was issued on this understanding, but the former insurance was renewed, there could be no recovery on the second policy.^{5]}

[§ 372 E. *Misrepresentation as to Other Insurance*. — A large overstating of the amount of other insurance on a building though made by mistake by the agent of the insured unknown to the latter, avoids a policy issued upon the application of the said agent, conditioned to be void by any misrepresentation whatever, and providing for apportionment of the loss among the various insurers. The misrepresentation was material.⁶ But where the company is not justified in relying on the representation it will not be fatal. In a list of existing insurance upon his property the applicant omitted by mistake the name of the E. Company, and a policy was issued by this E. Company, both parties believing that there was no prior

¹ [American Ins. Co. v. Luttrell, 89 Ill. 314 at 317.]

² [Sanders v. Cooper, 115 N. Y. 279.]

³ [Zimmerman v. Home Ins. Co., 77 Iowa, 685.]

⁴ [Bonneville v. Western Ass. Co., 68 Wis. 298.]

⁵ [Deitz v. Mound City Mut. F. & L. Ins. Co., 38 Mo. 85 at 94.]

⁶ [Armour v. Transatlantic Fire Ins. Co., 90 N. Y. 450.]

insurance in said company, the applicant did not positively state his list to be correct, but said he believed it was. The court held that if the company were satisfied to rely on a mere statement of belief honestly made, it had no right to complain that the facts were not fully represented. Especially must this be so when the means of verification are so easily within reach of the company as in this case.^{1]}

[§ 372 F. **Evidence.** — Proofs of loss disclosing other insurance operate as admissions of the assured, and make other proof unnecessary.² Parol proof is inadmissible to show that double insurance was meant by the terms of a policy reading “void if any *prior* insurance, &c.” There is no ambiguity to be explained.^{3]}

§ 373. **Overvaluation.** — Akin to the subject of double or over insurance is the subject of overvaluation, which in fact is more properly over-insurance. This is sometimes prohibited in the policy on pain of forfeiture, sometimes stated as a restriction upon the relative amount of the value which the insurers will assume the risk of, and sometimes not mentioned at all in the policy. The same reasons exist on the part of the insurers against overvaluation that we have already stated exist against double insurance. In both cases the interest of the insured in the preservation of the property is weakened, and motives supplied to desire its destruction. And it is not unusually stipulated against. But an overstatement of the value of the property for insurance upon which application is made may defeat the policy, whether there be any condition or stipulation in the policy to that effect or not. It is a material fact, in that it is of importance that the insured should be interested in the protection of the property. The smaller the amount of the insurance, therefore, the stronger his interest in the protection. The probable loss, in case of the destruction of the property by fire, is the incentive to vigilance in the protection of the whole, as well that which is covered by the policy as that which is not; for whatever threatens the

¹ [Bridgewater Iron Co. v. Enterprise Ins. Co., 134 Mass. 433, 438.]

² [N. Y. Central Ins. Co. v. Watson, 23 Mich. 486 at 488.]

³ [N. Y. Ins. Co. v. Thomas, 3 Johns. Cas. (N. Y.) 1 at 4.]

interest of the insurers threatens also the interest of the insured. But the law will not here interest itself in trifling discrepancies and insignificant differences, such as may be readily accounted for by that natural tendency to overestimate which self-interest always engenders. The overvaluation, in order to work a forfeiture of the right of recovery, must be a clear one; so clear that it is obvious at a glance, and cannot be accounted for upon the principle that every man is naturally prone to put a favorable estimate upon his own. It is not necessary that the overvaluation be intentional and fraudulent to have the effect of vitiating the policy. The effect is the same if it be done by mistake, and overvaluation by the agent is imputable to the principal.¹ It is usual to provide that fraudulent overvaluation shall avoid the policy; and, in point of fact, whether the provision be against fraudulent overvaluation or simply overvaluation, it is of but little moment. For no overvaluation but a gross and clear one, and such as is or must be presumed to be known to be such by the insured, and not known to the insurer, and therefore false and fraudulent, will in either case be held to vitiate the policy; and such a one will avoid the policy whether provided against or not.² And in considering

¹ *Carpenter v. American Ins. Co.*, 1 Story (U. S. C. Ct.), 57; *Bobbitt v. Liverpool, &c. Ins. Co.*, 66 N. C. 70; *Catron v. Tenn. Ins. Co.*, 6 Humph. (Tenn.) 176; *Carpenter v. Prov. Wash. Ins. Co.*, 16 Pet. (U. S.) 495; *Shaw v. St. Lawrence County Mut. Ins. Co.*, 11 U. C. (Q. B.) 73; *Gerhauser v. North British, &c. Ins. Co.*, 7 Nev. 174; *Franklin Life Ins. Co. v. Vaughan*, 92 U. S. 516; *Continental Ins. Co. v. Ware* (Ky.), 9 Ins. L. J. 519; *Riach v. Niagara, &c. Ins. Co.*, 21 U. C. (C. P.) 464; *Williams v. Phoenix Ins. Co.*, 61 Me. 67; *Newton v. Gore, &c. Ins. Co.*, 33 U. C. (C. P.) 92; *Leach v. Insurance Co.*, 58 N. H. 245; *Bonham v. Iowa Central Ins. Co.*, 25 Iowa, 328; *Citizens', &c. Ins. Co. v. Short*, 62 Ind. 316. In this case the court express the opinion that the law as stated in the text is too favorable to the insurers, and that no overvaluation but a "knowingly false and fraudulent" one will vitiate a policy. See also *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77. See § 373 A.

² *Hersey v. Merrimack County Mut. Ins. Co.*, 7 Fost. (N. H.) 149; *Dickson v. Equitable Fire Ins. Co.*, 18 U. C. (Q. B.) 246; *Wilbur v. Bowditch Mut. Ins. Co.*, 10 Cush. (Mass.) 446; *Prot. Ins. Co. v. Hall*, 15 B. Mon. (Ky.) 411; *Franklin Fire Ins. Co. v. Vaughan*, 92 U. S. 516. In this case a difference of over one-third was held immaterial. See also *Lingley v. Queen Ins. Co.*, 1 Hannay (N. B.), 280; *Cann v. Imperial Fire Ins. Co.*, 1 R. & C. (Nova Scotia) 240, where the overvaluation was more than two-fold, yet was held immaterial, the jury

the question, evidence of the value of similar property in the vicinity is competent, and in what degree of proximity vicinity is included, depends upon whether the property is situated in town or country.¹ [But evidence of offers for the property made after the execution of the policy, is not admissible.²]

[§ 373 A. **Overvaluation.** — Where the policy declares that an overvaluation will avoid it, any *substantial* overvaluation such as would not ordinarily* arise from mere difference of opinion, will be fatal whether it be fraudulent or not.³ Want of education cannot excuse a gross overvaluation.⁴ A provision that the statements are warranties and that overvaluation shall avoid the policy will be held to mean intentionally false valuation, if other parts of the policy show that it was the intent of the parties that only wilful misrepresentations should avoid the agreement.⁵ When the policy provided that an overvaluation should avoid it, but the overvaluation was in the written application, which assumed to state the value only *so far as was known* to the assured, it was held that, in the absence of fraud, the policy was good.⁶ There was no breach unless the false statement was knowingly made. Intentional overvaluation always avoids the policy obtained upon it.⁷ But it has been broadly held that an honest estimate of value though excessive will not be fatal, although the policy provides that any overvaluation of the interest assured shall

having negatived fraud. See also *Parsons v. Citizens' Ins. Co.*, 43 U. C. (Q. B.) 261; *Mason v. Agr. Ins. Co.*, 18 U. C. (C. P.) 19. Gross overvaluation, resulting from a wilful neglect of the means of making a correct one, and having the effect of misleading the insurer to his prejudice, though not intentionally fraudulent, is not innocent, and vitiates the policy. *Leach v. Republic Fire Ins. Co.*, 58 N. H. 245. But see *Sturm v. Atlantic Ins. Co.*, 63 N. Y. 77. See also *ante*, § 30. As to overvaluation of loss, see *post*, §§ 443, 477.

¹ *Haines v. Republic Fire Ins. Co.*, 52 N. H. 467; *Howard v. City Fire Ins. Co.*, 4 Denio (N. Y.), 502.

² [*Wood v. Firemen's Fire Ins. Co.*, 126 Mass. 316 at 319.]

³ [*Boutelle v. Westchester Fire Ins. Co.*, 51 Vt. 4.]

⁴ [*Nassauer v. Insurance Co.*, 109 Pa. St. 507.]

⁵ [*Wheaton v. North Brit. & Mer. Ins. Co.*, 76 Cal. 415.]

⁶ [*Miller v. Alliance Ins. Co.*, 19 Blatch. 308 at 310.]

⁷ [*Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402.]

avoid the policy issued on such description.¹ An over-estimate of the amount of loss sustained, made honestly and in good faith, is neither fraud nor false swearing within the meaning of a policy.² It was at first held in Texas that only an overvaluation in the application so gross and clear that it must be presumed that the assured was not acting in good faith, will avoid the policy,³ and cases were referred to in which an overvaluation of one-third had been held immaterial;⁴ and also one that was more than twofold;⁵ but upon error the case was remanded, the court remarking that it was not necessary for the overvaluation to be fraudulent; though made by mistake it might be fatal, citing May, § 373, to that effect.⁶ A claim more than double the amount found due will be held fraudulent in the absence of clear evidence to the contrary.⁷ But an apparent overvaluation of about twenty per cent is held not fraudulent.⁸ Where a house was valued at \$1400, and the evidence tended to show that it was only worth about \$1000, it was held that the difference was not so great as to make it *matter of law* that there was overvaluation within the meaning of the warranty.⁹ And valuing goods worth \$1200 at \$2000 does not as matter of law prove fraudulent intent.¹⁰ It is error to refuse to instruct the jury on a question of breach of covenant relating to the valuation of the property; as where the company claimed that the applicant had put the two-thirds value too high to his knowledge.¹¹

[§ 373 B. **Overvaluation.** — An overvaluation of part of the property insured will not avoid the policy as to the rest.¹² Over-

¹ [Susquehanna Mut. Fire Ins. Co. v. Staats, 102 Pa. St. 529; Pickel v. Phenix Ins. Co., 18 Ins. L. J. 598 (Ind.), June, 1889.]

² [Phoenix Ins. Co. v. Munday, 5 Cold. (Tenn.) 547 at 552.]

³ [Eakin v. Home Ins. Co., 1 Tex. App. Civ. Cas. § 368.]

⁴ [Franklin Ins. Co. v. Vaughan, 92 U. S. 516.]

⁵ [Cann v. Imperial Fire Ins. 1 R. & C. (Nova Scotia), 240.]

⁶ [Home Ins. Co. v. Eakin, 2 Tex. Civ. Cas. § 665.]

⁷ [La Rocque v. Royal Ins. Co., 23 L. C. Jur. 217.]

⁸ [Northern Ass. Co. v. Provost, 25 L. C. Jur. 211.]

⁹ [Smith v. Home Ins. Co., 47 Hun, 30.]

¹⁰ [Behrens v. Germania Fire Ins. Co., 64 Iowa, 19.]

¹¹ [Insurance Co. v. McCluckin, 40 Ohio St. 42.]

¹² [Smith v. Home Ins. Co., 47 Hun, 30, 34.]

valuation that is known or ought to be known to the agent is waived when the company rejects the claim for loss on other grounds.¹ But where the general agent, knowing that there was overvaluation but not knowing it to be fraudulent, asked for proofs of loss, there was no waiver of the overvaluation.² And the assured cannot escape responsibility for the statements which he himself inserts in the application or permits the agent to insert, in respect to facts about which he is just as well informed as the agent, by showing that he was induced by the agent knowingly to state them falsely. This includes valuation, and the applicant must be responsible for any substantial excess when he warrants the value.³ In Maine by statut^e the question is whether the erroneous statement of value materially increased the risk or contributed to the loss.⁴ Overvaluation at the time of insurance is not material when it is provided that the insurance paid shall never exceed three-fourths of the value at the time of loss.⁵

§ 374. **Overvaluation.** — But the rule as to overvaluation is not applicable to the case of an open policy upon a stock of goods which is constantly varying in amount, nor where the insurer is to be liable only for a proportion of the loss. Thus, where a merchant procures insurance upon his stock of goods, and fixes the valuation neither upon the reduced stock which he happens to have on hand at the end of the busy season when the insurance is applied for, nor upon the unusually large stock on hand at the commencement of the season, but upon a fair average between the two, this is permissible, because it is within the intention of the parties, although the incentives to vigilance, and the temptation to destroy on the part of the insured, may vary with the varying amount of the stock. So if the insurer is in no case to be responsible beyond a certain fixed proportion, as, for instance, two-thirds of the loss, the insured has always before him the same un-

¹ [Walsh's Adm'r. v. Vermont Mut. Fire Ins. Co., 54 Vt. 351.]

² [Wheaton v. Brit. & Mer. Ins. Co., 76 Cal. 415.]

³ [American Ins. Co. v. Gilbert, 27 Mich. 429 at 439 and 441.]

⁴ [Thayer v. Providence, &c. Ins. Co., 70 Me. 531, 536.]

⁵ [Schmidt v. Mut. City, &c. Ins. Co., 55 Mich. 432.]

varying proportion of the risk, and the usual objections to overvaluation do not obtain.¹ If no valuation is stated in the contract, prior oral statements showing overvaluation are inadmissible. The making of a contract, without requiring any statement of the value, must be regarded as evidence that the insurer regarded it as immaterial.² If by the form of the policy the statement of value is a warranty, and it appears by the plaintiff's own showing that it is clearly overstated, and knowingly so, the court will not submit the question to a jury,³ even though the liability of the insurers is to be but two-thirds of the real value.⁴

§ 375. **Overvaluation ; Renewals upon changing Stock.** — It may happen that under repeated renewals of insurance, without any change in the application, upon the same property, a depreciation in its value may take place, so that the representations as to its value at the time of the first insurance may not be strictly true at the date of the last insurance. But such a variance is no fraudulent overvaluation or misrepresentation.⁵

§ 376. **Restriction of Value by Charter or By-laws or Terms of the Policy.** — The charters of mutual insurance companies usually restrict the amount of the risk which they are permitted to assume to a certain proportion of the value of the property insured. In such cases the restriction is to be regarded as directory merely, and not prohibitory. The violation of the charter is a matter for the insurers to settle with those who gave them their charter, but they cannot set up their own misconduct in defence against the claim of the insured for indemnity, as by showing that in insuring to the

¹ *Lee v. Howard Fire Ins. Co.*, 11 Cush. (Mass.) 324; *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Cox v. Ætna Ins. Co.*, 29 id. 586; *Bonham v. Iowa Central Ins. Co.*, 25 Iowa, 328.

² *Bardwell v. Conway Mut. Ins. Co.*, 118 Mass. 465; *Insurance Co. of North America v. McDowell*, 50 Ill. 120.

³ *American Ins. Co. v. Gilbert*, 27 Mich. 429.

⁴ *Bobbitt v. Liverpool, &c. Ins. Co.*, 66 N. C. 70. But see *Bonham v. Iowa Central Ins. Co.*, 25 Iowa, 328.

⁵ *Gerhauser v. North Brit. & Mer. Ins. Co.*, 7 Nev. 174; *Eddy St. Iron Foundry v. Farmers' Mut. Ins. Co.*, 5 R. I. 426.

stipulated amount they have infringed one of their own by-laws.¹ An estimate, whether by the agent of the insurers or by him and the insured combined, in the absence of all fraud, collusion, and misrepresentation, fixed by agreement, — an estimate upon which premiums are paid and assessments laid, and the amount to be paid by the company in case of loss determined, — is the best evidence of the value of the premises insured, and cannot be treated as a valuation not permitted by the charter or by-laws.²

¹ Cumberland Valley Mut. Prot. Ins. Co. v. Schell, 29 Pa. St. 31; Hoxsie v. Prov. Mut. Fire Ins. Co., 6 R. I. 517; Fuller v. Boston Fire Ins. Co., 4 Met. (Mass.) 206. And see *ante*, §§ 23, 63, 65.

² Fuller v. Boston Fire Ins. Co., 4 Met. (Mass.) 206; Wilbur v. New England Mut. Fire Ins. Co., 31 Me. 219.

CHAPTER XIX.

ASSIGNMENT OF THE POLICY.

ANALYSIS.

ASSIGNMENT BEFORE LOSS.

Insurance other than Life.

The common law would not permit the assignment of a *chose in action*; equity however upheld the transaction, and the assignee could sue in the name of the assignor and recover for his own benefit, subject to all defences, legal or equitable, that could be made against the assignor before notice of the transfer to the obligor. § 377. If the debtor assents to the assignment, and agrees to pay the assignee, a new contract arises. The peculiar nature of insurance brings an element into the problem of transfer not existing in most cases. *A policy is a contract of indemnity for the loss of a valuable interest, and subject to avoidance by the violation of any one of numerous conditions.*

- (1) Now if the policy is assigned without a transfer of the interest it protects, it is clear that, even though the company may assent, there is no complete transfer, as in case of the assignment of a note. § 379. The assignor is still the person assured, for he is the one who possesses the insurable interest. The contract could not possibly be made with the assignee. He is merely the person to whom the money is to be paid, if, upon the contract with the assignor it ever becomes due. § 378. The "assignment" so called is a mere designation of the payee. He may have *an* interest in the property or not, but he has not *the* interest that was insured. He can sue in his own name if the company has agreed to pay him, but if the assignor breaks a condition before or after assignment, and it is not waived, the assignee will receive nothing. §§ 382, 378 A. As between the parties to the assignment, however, it creates an equitable lien on the funds, § 380, although the transfer is only as collateral, before loss, and to one without interest. § 386.
- (2) If the interest insured, as well as the policy, is transferred to the assignee, with assent of the company, a new contract is formed with the assignee, §§ 378, 378 A, and any subsequent breach of condition on the part of the assignor will not affect the assignee, §§ 378, 378 A, and he can sue in his own name. § 381. See also §§ 383-384. But as to the *past*, the assignee simply steps into the shoes of the assignor.

It has even been held that an assignment as collateral, with assent, to one waiving a lien on the goods, will not be affected by fraud of the assignor. § 378 A.

But this is clearly wrong on the above reasoning.

In marine insurance custom allows the transfer of a policy with the subject-matter without special assent of the company. § 377.

Life Insurance.

A man may take out a policy on his own life, and make it payable to any person he chooses as beneficiary, § 112. It would be useless to deny this privilege, as the same thing could be accomplished by taking the policy to himself and representatives, and willing the fund to the beneficiary. Moreover no one can object if the beneficiary supplies the insured with money to pay the premiums. Now if A. takes out a policy on his own life and assigns it to B., the case is in substance no different from one in which B. is named as beneficiary. (If the interest insured is not passed, as in this case it would not be, as the insured could not give his life to B., a subsequent breach of condition by the assignor would be fatal to the assignee. If a creditor insures the life of a debtor, a transfer of debt and policy, with assent, would undoubtedly create a new contract.)

There is, however, a strong dispute on this question of assignment to one without interest in the "life," some authorities maintaining that assignment to one without interest is "open to all the objections that can be raised against the original taking out of insurance by one with no interest." § 398, and note. This, however, is not true. There is an immense difference between allowing A. to choose for himself to secure to B. a benefit on his decease, and allowing B. of his own motion to secure such a benefit on the life of A. without A.'s action in the matter. The activity of the "life" in obtaining the insurance and selecting the beneficiary seems the true line of distinction, and not the contingent benefiting of one without interest. At any rate, to be consistent the law must either allow free assignment or limit the choice of beneficiaries. *The life should be free to assign to any one he could have chosen as his beneficiary.*

Of course the intent of the parties must always be looked to. If, for example, the transfer appears to be for the security of a creditor, he should not be allowed to hold more than compensation for his debt, premiums, expenses, &c. See chap. 24.

If the transfer is to one with an interest, § 398, and is free from fraud, § 397, it is good. § 388.

If the company waives the want of interest, the assignor cannot object, § 398 A; but an heir may object that the assignment is invalid in form. § 399 B.

What is an assignment? §§ 379, 395.

a transfer that will be upheld and will carry rights to the transferee is not always held to be a transfer that will avoid the policy under the clause against assignment, § 379.

an *intent* to transfer is not an assignment, § 379 n.

a part transfer as collateral not fatal, § 379 n.

a provision against assignment as collateral means *without* transferring the property, § 379 n.

assignment of all property to creditors does not carry a policy, §§ 379, 391 B, 386.

contra, § 379 n.

indorsement "pay to A. B." not a fatal assignment, § 379 n.

Consent, 382-385, 385 A., 387.

In writing. Indorsement.

attesting by agent sufficient, § 385 A.

paper attached by wafer sufficient indorsement, § 385 A.

assent to assignment of policy *after* transfer of property sufficient, § 385 A.

oral promise to indorse not enforceable after loss, where insured neglected to take policy for indorsement before loss, § 385 A.

receipt of assessments from assignee no waiver of condition as to written assent, § 385 A.

consent of no avail if facts are withheld that might have prevented assent, § 385 A.

company cannot arbitrarily refuse, contrary to the spirit of the policy, § 387.

General.

Assignment in whole or part, § 380.

assignment as *collateral* is fatal if policy provides against assignment in whole or *any interest under it*, § 380.

The intent to transfer the *whole* chose must be *manifested* by action appropriate to the circumstances, *i. e.*, delivery of the document securing it, to the assignee or to some one for him if it is possible, § 389.

assignment of part without assent invalid, § 399.

Disposition of proceeds, creditors, children, wife, heirs, administrator, conflict of claims, § 390.

Assignment by married woman, rights of children, § 391.
See also § 392.

If the interest of the insured is transferred to C., and then the policy to B., the latter cannot recover, even though the company consented, and B. was a mortgagee; his own interest was not insured by the consent, and the old interest back of the policy was divorced from it. § 378 n.

So an assignment after the assignor's lease has expired will not bind the company to pay the assignee, § 378 n.

A defective assignment may take effect as a designation to pay, § 378 n.

Possession, delivery, &c., § 395.

- Delivery to another for the donee is sufficient. § 378 n.
- When the "life" may assign, § 391.
- Husband and wife, §§ 391 A, 390-394.
- Creditors, §§ 391 B, 390-394.
- Beneficiaries, §§ 390-394, and next chapter.
- In whose name suit is to be brought, §§ 393, 381, 378.
 - one may have the right to sue, but not to use proceeds, § 393.
- A policy may be drawn payable to A. or his assignees, § 399 A.
- Assignee causing death, § 399 A.
- Notice of transfer, § 396 (life).
- One may be held as a trustee in respect to a policy, §§ 393, 399 A.
- Assignment as collateral gives equitable lien on proceeds without regard to assent, §§ 380, 386.
- Assignor of collateral must pay premiums, § 399 A.
 - they may be added to mortgage, § 399 A.
- Assignee in bankruptcy can recover from the bankrupt only the value of the policy, and not what the company may have paid him, § 399 B.
- Fraud, §§ 385, 397.
- Violation of conditions by assignor, §§ 378 A., 379, 381, 386, 452 D.
 - measure of damages he must pay assignee, § 399 B.
- Damages for breach of agreement to assign, § 399 B.
- Bequest, devise, *donatio causa mortis*, &c., §§ 399 C., 392.
- Transfer of assured's interest, §§ 381, 381 a.

ASSIGNMENT AFTER LOSS —

- is only an assignment of a debt, and
- is always good in equity, subject to claims in set-off, &c., against the assignor before notice. § 386. The assignee stands in the shoes of the assignor as to breath of condition also, § 386.
- of the *whole* amount is good without acceptance, § 386.
- is not a violation of the clause against transfer, although it reads "before or after loss," § 386.
- nor within condition requiring assent, § 386.
- a prohibition of, is illegal, § 386.
- specific performance of, § 386.
- good without record or delivery against garnishment, § 386.

§ 377. **Assignment of Policy not permitted by the Common Law.** — We have already considered, in the chapter on alienation, the effects of a transfer of the property insured. We are now to consider the effect of a transfer of the policy of insurance, or, as it is usually termed, the assignment of the policy. It is usual to provide that if the policy be assigned without the consent of the insurers it shall be void. At common law a policy of insurance against fire is not assignable in any such sense as to give the assignee a right to sue in his

own name. By an assignment the assignee acquires merely a *chose in action*, giving to the holder at most an equitable claim, which he can assert and enforce only in the name of the assignor. With a very few exceptions, as in the case of bills of exchange, bills of lading, and policies of marine insurance, the common law has steadily denied the right of one man to make over his right of action against another to a third party, a stranger to the contract, as against public policy, and tending to the multiplication of suits. In the case of marine policies, custom seems to have established a rule different from that of the common law, and to have made the policies transferable with the subject-matter of insurance. In fact, in early times, in marine insurance, policies were issued in blank as to the assured, and passed from hand to hand without indorsement or assignment, but merely by delivery, like a promissory note payable to bearer, along with the thing insured. And to this day, if there be an assignment of the policy, coupled with the transfer of the subject-matter of insurance, although there be no consent of the insurers to either the assignment or the transfer, the assignee thereby acquires a claim against the insurers, which he can enforce in a suit at law in his own name. This distinction is said to rest upon the fact that there is less of mere personal consideration, in regard to the risk, in marine insurance than in fire, and that practically, if not theoretically, the insurance here is rather of the thing than of the particular owner; while in fire insurance, on the contrary, it is rather of the owner than of the thing, the character of the owner as a man of prudence, integrity, and watchfulness entering much more largely as an element into the estimate of the risk. Commercial convenience also doubtless has much to do with the distinction.¹ But whatever may be the grounds of the distinction, it is certain that it exists; and while marine policies have always been held assignable without the consent of the insurers, the contrary has always been and still is the law with reference to fire policies.²

¹ *Crozier v. Phoenix Ins. Co.*, 2 Hannay (N. B.), 200, Wildes, J. See also *post*, § 380.

² *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385; *Columbian Ins. Co.*

§ 378. **Different Modes of Assignment, and their Effects.**— Though, strictly speaking, no assignment of the policy can be made, yet there are certain transfers of it which are often made, which have a validity recognized by the courts, and which, according as they are effected by mere delivery or in writing, and with or without the transfer of the property upon which they are issued, and with or without the consent of the insurers to the transfer of the policy and the property, are attended by different consequences. In the case of *Fogg v. Middlesex Mutual Fire Insurance Company* some exceedingly valuable observations were made upon the general subject, as well as upon the different modes of assignment and their effect, which we give in the language of the court, per Shaw, C. J.:—

“As a policy of insurance is not a negotiable instrument, it cannot be legally transferred so as to enable the assignee to maintain a suit in his own name without the consent of the other party. But in general, at the common law, where one party assigns all his right and interest in the contract, and the assignee gives notice to the other party to the contract, and he agrees to it, this constitutes a new contract between one of the original parties and the assignee of the other, the terms of which are regulated and fixed by those of the original contract. This rule applies to policies as well as other contracts, and it is often convenient and desirable to apply it; and there are two cases where this application frequently happens.

“The first is, when the insured property is alienated or sold by the assured. After such sale, if nothing more is done, no surrender or change of the policy, and the goods should be burnt, nobody could recover on the policy: not the original assured, for he has sustained no loss, the property was not his, and the loss of it was not his loss; not the purchaser, because he has no contract with the company. And although

v. Lawrence, 2 Pet. (U. S.) 25; *Lynch v. Dalzell*, 4 Brown, P. C. 431; *Simeral v. Dubuque Mut. Fire Ins. Co.*, 18 Iowa, 319; *London Ins. Co. v. Montefiore*, 9 L. T. N. S. 688. “I see no use or convenience in preserving the shadow when the substance is gone.” *Buller, J., Master v. Miller*, 4 T. R. 340.

in popular language the goods are said to be insured against loss by fire, yet, in legal effect, the original assured obtains a guaranty by the contract that he shall sustain no damage by their destruction by fire. But in case of such sale or alienation of the insured property, the original assured having no longer any interests in the policy except to claim a return of premium, if he will assign his policy or his contract of insurance to such purchaser, and the company assent to it, here is a new and original contract, embracing all the elements of a contract for insurance between the assignee and the insurers. The property having become the purchaser's, is at his risk, and, if burnt, it is his loss, and he has a good original contract, upon a valid consideration, to guarantee him against such loss. Accordingly, provision is made in the charter and by-laws, and also by the terms of the policy, for an assignment of the contract. The company returns no part of the premium, but the assignee has the benefit of it upon such terms as he and his assignor may determine; the assignment is indorsed on the policy and presented to the president of the company, who ordinarily is authorized to give the assent of the company to the assignment; the old deposit note is surrendered, and a new deposit note given by the assignee.¹

“In the regulations of this company in a circular of instruction to agents, a form is given for such transfer, notifying the sale of the property, naming the purchaser, and assigning to such purchaser, his executors, &c., the policy of insurance, and, in case of loss, directing the amount to be paid to the said purchaser, his heirs, &c. Upon such assignment perfected there is an entire change in the contract, in the party contracted with, in the insurable interest in the property at risk; and it becomes an insurance on the property of the assignee, and ceases to be a contract of insurance of the property of the assignor.²

¹ And this new deposit note is the sufficient new consideration for the new promise to the assignee. *Demill v. Hartford Ins. Co.*, 4 Allen (N. B.), 341. A mortgage and recorded assignment of the policy as security leaves the mortgagor, as the insured, liable to assessments. *Cummings v. Hildreth*, 117 Mass. 309.

² 10 Cush. (Mass.) 337; *Mechanics', &c. Soc. v. Gore Dist. Ins. Co.*, 3 Ont.

“But there is another species of assignment, or transfer, it may be called, in the nature of an assignment of a *chose in action*. It is this: ‘In case of loss, pay the amount to A. B.’ It is a contingent order or assignment of the money, should the event happen upon which money will become due on the contract. If the insurer assents to it, and the event happens, such assignee may maintain an action in his own name, because, upon notice of the assignment, the insurer has agreed to pay the assignee instead of the assignor.¹ But the original

App. 151. See also *Foster v. Eq. Mut. Ins. Co.*, 2 Gray (Mass.), 216. So if the policy is payable to the mortgagee, and by its terms he assumes to pay the premiums or assessments if the mortgagor does not. *Francis v. Butler Fire Ins. Co.*, 7 R. I. 159. [A policy to a mortgagee conditioned to be void for any change in the title or possession, was assigned to one to whom the assured without the company’s knowledge had conveyed the property, the mortgage being thereby satisfied. The company’s agent, having power to make agreements and issue policies, agreed with the purchaser and assignee that the assigned policy should have the effect of a new one, and the company was held bound. *Amazon Ins. Co. v. Wall*, 31 Ohio St. 628 at 633. A consent to an assignment by an officer authorized to make it is not a waiver of a condition, but an agreement. *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. St. 460, 472. But where the insured, a mortgagor, alienated the property, thereby avoiding the policy, and afterward the mortgagees entered for condition broken, and the company made an indorsement, to the effect that “this policy shall attach and cover their [the mortgagees’] interest as such,” it was held that the mortgagees could not sue the company, for if the interest referred to in the indorsement was the same or a part of the same interest previously insured to the mortgagor, and now supposed to be transferred from the mortgagor to the mortgagees, the plaintiff’s case must fail, because the breach of condition and entry had no such effect, and because the mortgagor had no interest at all at the time of entry, and if on the other hand the indorsement is to be taken as promising to insure the mortgagees’ interest generally, which had been outstanding but uninsured up to that date, it equally fails to give any rights to the plaintiffs because without consideration. *Davis v. German-American Ins. Co.*, 135 Mass. 251, 254–255. A voluntary assignment of a policy after the lease of the insured property has expired does not oblige the company to pay the proceeds to the assignees. One must have an interest or property at the time of insuring and at the time the fire happens. *Sadlers’ Ins. Co. v. Babcock*, 2 Atk. 554 at 555.]

¹ *Mowry v. Todd*, 12 Mass. 281. [An attempted assignment, though not properly made to take effect as an assignment, may nevertheless take effect as a direction to pay the money to the assignee as a beneficiary, where the assignment was simultaneous with the issuing of the policy, and it is apparent that the original intention was to make the policy so payable. *Scott v. Dickson*, 108 Pa. St. 6. An assignment of a life policy delivered to the company and accepted and filed by it with the understanding that the money was to be paid by it to the donee named in the assignment, is valid. It is not necessary that delivery be made

contract remains; the assignment and assent to it form a new and derivative contract out of the original. But the contract remains as a contract of guaranty to the original assured; he must have an insurable interest in the property, and the property must be his at the time of the loss. The assignee has no insurable interest *prima facie* in the property burnt, and does not recover as the party insured, but as the assignee of a party who has an insurable interest, and a right to recover, which right he has transferred to the assignee, with the consent of the insurers."¹

[378 A. **Violation of Conditions by Assignor.** — By a sale of the property and an assignment of the policy with the company's consent, a new contract arises which may be enforced without regard to what occurred before the transfer if the assignee is innocent of fraud.² A past breach of condition by the original policy-holder in respect to incumbrances cannot be set up, even though the breach was unknown to the company at the time of assent.³ If the insured conveys his interest and assigns the policy, and afterward makes repairs without the company's consent as required, his act does not prejudice the assignee.⁴ In South Carolina, where N. held goods on which K. had a general lien, and to protect this N. deposited his policy in the hands of K. with the consent of the company, it was held that K. had by the transaction an equitable interest in the policy that would be recognized at law in a suit brought in the name of N., and that the company could not defeat the recovery for the benefit of K. by showing that N. had forfeited his right of recovery by acts of fraud. The company could not deprive K. of the security acquired

directly to the donee. It is enough if it is made to another for the donee, in such manner as to divest the possession and title of the donor. *Hurlbut v. Hurlbut*, 49 Hun, 189.]

¹ See also *Wilson v. Hill*, 3 Met. (Mass.) 66; *Carpenter v. Prov. Wash. Ins. Co.*, 16 Pet. (U. S.) 495; *Pratt v. New York Central Ins. Co.*, 64 Barb. (N. Y.) 589; *Martin v. Franklin Fire Ins. Co.*, 9 Vroom (N. J.), 140; *Cummings v. Cheshire Ins. Co.*, 55 N. H. 45.

² [*Continental Ins. Co. v. Munns*, 120 Ind. 30.]

³ [*Ellis v. Insurance Co.*, 32 Fed. Rep. 646 (Iowa), 1887; *Continental Ins. Co. v. Munns*, 19 Ins. L. J. 57 (Ind.), September, 1889; 120 Ind. 30.]

⁴ [*Breckinridge v. America Cent. Ins. Co.*, 87 Mo. 62.]

with its consent except for fault of his own.¹ This is manifestly wrong, as noted by Mr. May without stating the facts. The assignor held the interest assured, and was therefore the real assured whose acts must affect the policy. The assignee held the policy as security. If the policy was good his security was good; if the policy was avoided in any way his security was gone. The company did not guarantee that the policy would remain valid. But an assignee of a policy with consent of the company who is not interested in the property, does not become the insured, and remains liable to be defeated by acts of the assignor.² And it has been held that even where the assignee has an interest in the property the company does not always give up its right to have the conditions of the policy fulfilled. After a mortgagor has assigned the policy to the mortgagee with assent of the company, if the mortgagor sells the estate, the policy may be avoided.³ The cases holding the contrary are distinguished by the court on the ground that they contained facts amounting to a new consideration moving from the assignee to the company, — such facts as that the assignee gave consideration to the assured and promised to pay all assessments, and that the property should remain subject to the same lien as before, — while in this case and in 6 Gray the assignee gave no consideration, and was therefore affected by all subsequent breaches of the policy by the assignor. And the company can make any defences against an assignee with consent that existed against the assignor at the time of the assignment. The assignee takes no *new* contract free of the *past*, but simply steps into the shoes of the assignor, and for the future is substituted for him.⁴ If in violation of the policy an incumbrance is put on the property, and afterward the policy is assigned with assent of the company but *without knowledge* on its part of the incumbrance, it is the assignment of a void policy and the assignee cannot recover.⁵]

¹ [Charleston Ins., &c. Co. v. Neve, 2 McM. (S. C.) 237, 248.]

² [Kanady v. Gore Dist. Mut. Fire Ins. Co., 44 U. C. R. 261.]

³ [Swenson v. Sun F. Office, 68 Tex. 461; Hale v. Ins. Co., 6 Gray, 169, approved.]

⁴ [Reed v. Windsor County Mut. Fire Ins. Co., 54 Vt. 413.]

⁵ [Ellis v. State Ins. Co., 68 Iowa, 578.] ,

§ 379. **What is and what is not an Assignment of a Policy.** — Having recognized that certain acts may amount to what has come to be treated as an assignment of the policy, the courts have been called upon to consider the question what constitutes an assignment of the policy within the meaning of the condition which prohibits it without the assent of the insurers, and under such condition will work a forfeiture. And hereupon the cases are numerous. Not every assignment which gives such rights as a court of law or equity would feel bound to recognize and protect would amount to an assignment which works a forfeiture. The rule in the former case would doubtless be one of liberality in favor of the assignee, while in the latter it would be one of strictness against the insurers.¹ An alienation or transfer of the property is not of itself an assignment of the policy, does not carry the policy with it, nor is it necessary to the validity of an assignment of the policy.² Nor is an alienation of the property after the loss made in execution of a contract entered into before the loss, coupled with an agreement to assign the policy,³ nor a mortgage of a stock of goods insured, coupled with an agreement to hold the policy for the benefit of the mortgagee, an assignment of the policy within the meaning of a condition that the policy is to be void if assigned without the consent of the insurers;⁴ [nor an *intention* to transfer a policy, however strong, if the proper steps be not taken to accomplish it;⁵] nor an unexecuted agreement to assign, whether by parol⁶ or in writing;⁷ nor is a pledge

¹ *Lazarus v. Com. Ins. Co.*, 5 Pick. (Mass.) 76.

² *Phillips v. Merrimack Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 350; *Stout v. City Fire Ins. Co.*, 12 Iowa, 371.

³ *Wheeling Ins. Co. v. Morrison*, 11 Leigh (Va.), 354; *Pierce v. Nashua Mut. Fire Ins. Co.*, 50 N. H. 297.

⁴ *Prows v. Ohio Valley Ins. Co.*, 2 Cincinnati Superior Court Reporter, 14; [*Sovereign Fire Ins. Co. v. Peters*, 12 Can. Supr. Ct. 33.]

⁵ [*Bound Brook Mutual Fire Insurance Ass. v. Nelson*, 41 N. J. Eq. 485, 488.]

⁶ *Cromwell v. Brooklyn Fire Ins. Co.*, 39 Barb. (N. Y.) 227.

⁷ *Smith v. Monmouth Mut. Fire Ins. Co.*, 50 Me. 96. If the policy be indorsed, it seems that the assignment should also be. *Crozier v. Phoenix Ins. Co.*, 2 Hannay (N. B.), 200.

of the policy as collateral security;¹ nor is a general assignment of all personal property for the benefit of creditors;² nor is a designation in the policy of a certain person not interested in the property — a stranger — as payee in case of loss, an assignment within the meaning of such a condition;³ nor is an indorsement on the back of the policy to that effect assented to by the insurers.⁴ And where the policy is merely made payable in case of loss to the mortgagee, this is no assignment of the policy. Nor does it convert the policy into a contract of insurance with the mortgagee; and he is liable to all the defences against the policy to which the applicant would be. He is subject to all the conditions of the policy, and takes the risks growing out of the acts or conduct of the

¹ *Ellis v. Kreutzinger*, 27 Mo. 311; [*Mahr v. Bartlett*, 53 Hun, 388; *True v. Manhattan Fire Ins. Co.*, 26 Fed. Rep. 83 (Col.), 1885, unless the policy is specially conditioned against such assignment; *Lynde v. Newark Ins. Co.*, 139 Mass. 57. A policy containing the clause "if this policy shall be assigned before a loss without consent of the company indorsed thereon" it shall be void, is affected only by an absolute transfer of the *whole* interest in the policy, and not by a transfer by way of pledge or security for a special and temporary purpose. *Griffey v. New York Central Ins. Co.*, 30 Hun, 299; 100 N. Y. 417. A provision in the policy that it is not assignable for purposes of collateral security, applies only to assignments of the policy, and not to cases in which the property insured is also transferred as security. *Hoyt v. Hartford Fire Ins. Co.*, 26 Hun, 416. In this case it was specially provided that on transfer of title to the property with consent, the policy might be assigned.]

² *People v. Beigler, Hill & Denio* (N. Y.), 133; *Lazarus v. Com. Ins. Co.*, 5 Pick. (Mass.) 76; *post*, § 386. [But *contra*. An assignment by a debtor of all his property for the benefit of creditors carries a policy of fire insurance, and if it is conditioned to be void by assignment without assent, such action is fatal to it. *Dube v. Fire Ins. Co.*, 64 N. H. 527.]

³ *Frink v. Hampden Ins. Co.*, 45 Barb. (N. Y.) 384; *Birdsey v. City Fire Ins. Co.*, 26 Conn. 165. [The indorsement on a policy, "Pay under the within policy to A.B. or order," signed by the assured, is not an assignment by virtue of which any new party to the insurance is added, *Minturn v. Manufacturers' Ins. Co.*, 10 Gray, 501 at 506; but only an order to pay to A.B. the amount of any loss. When the assured indorsed on the policy "in case of loss pay to A.," to whom he was indebted, and the policy was left with A. for collection with the understanding that he should deduct the assured's debt, the transaction was held not to constitute an assignment that would avoid the policy, but only the creation of an agency for the collection of the policy in the absence of the assured, the funds to be applied for his benefit. *Russ v. Waldo Mut. Ins. Co.*, 52 Me. 187 at 191.]

⁴ *Fogg v. Middlesex Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 337.

insured, even though by the terms of the policy loss is to be paid to the assignee, as his interest may appear; and the assent of the insurers does not operate to produce a new contract between them and the assignee, but merely to save the policy from forfeiture. The insurers are only bound to pay to the mortgagee what may be found due the insured in case of loss; and if he have a policy originally invalid, or by his conduct, by alienation or otherwise, has forfeited the right to recover, there is nothing to be paid the mortgagee, even though the assignment be consented to by the insurers.¹ In such cases, whether the transfer be to a stranger or to the mortgagee, the assignment is a mere equitable transfer of the right to receive any sum that may be due in the event of a loss. But while such mortgagee is not an assignee, the promise to pay to him in case of loss, though not an assignment to work a forfeiture, is so far an assignment, and gives to the mortgagee such rights under the policy, that, in the absence of any special provision in the policy with reference to arbitration in case of loss, the mortgagor and insurer cannot conclude the mortgagee by a reference of the claim for loss to arbitration.² And if the mortgagee has agreed to pay assessments if the mortgagor does not, the failure of the

¹ *Loring v. Manufacturers' Ins. Co.*, 8 Gray (Mass.), 28; *Home Mut. Ins. Co. v. Hauslein*, Sup. Ct. (Ill.), 1 Ins. L. J. 818; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391; overruling on this point s. c. 1 Bosw. (N. Y. Superior Ct.) 469, and 5 Duer (N. Y. Superior Ct.), 517; *Traders' Ins. Co. v. Robert*, 9 Wend. (N. Y.) 404; *Tillou v. Kingston Mut. Fire Ins. Co.*, 1 Seld. (N. Y.) 405, s. c. 7 Barb. (N. Y.) 570, and *Viall v. Genesee, &c. Ins. Co.*, 19 Barb. (N. Y.) 440; *McCluskey v. Providence Ins. Co.*, 126 Mass. 306; *Baldwin v. Phoenix Ins. Co.* (N. H.), 10 Ins. L. J. 34; *Fitchburg Savings Bank v. Amazon Ins. Co.*, 125 Mass. 431; *Bates v. Equitable Ins. Co.*, 10 Wall. (U. S.) 33; *Brunswick Sav. Inst. v. Commercial, &c. Ins. Co.*, 68 Me. 313; *Franklin Sav. Inst. v. Central Ins. Co.*, 119 Mass. 240; *post*, § 447; *Continental Ins. Co. v. Hulman*, 92 Ill. 145; *Martin v. Franklin Fire Ins. Co.*, 9 Vroom (N. J.), 140; *Griswold v. Am. Central Ins. Co.*, 1 Mo. App. 97; s. c. affirmed, 9 Ins. L. J. 254; *Illinois Ins. Co. v. Fix*, 53 Ill. 151; *Humphrey v. Hartford Fire Ins. Co.*, U. S. Dist. Ct., North Dist. N. Y., *Blatchford, J.*, 9 Repr. 106; *Livingstone v. Western Ins. Co.*, 16 Gr. Ch. 9. reversing s. c. 14 id. 437; *post*, § 382; *Sias v. Roger Williams Ins. Co.*, C. Ct. (N. H.), 9 Ins. L. J. 154.

² *Brown v. Hartford Ins. Co.*, 5 R. I. 394; *Brown v. Roger Williams Ins. Co.*, id.; otherwise, perhaps, if the assignee have no interest. *Miall v. Western Ins. Co.*, 19 U. C. (C. P.) 270.

mortgagor to pay will not work a forfeiture.¹ So where a policy with the insurer's consent has been assigned to a mortgagee.² Though there are respectable authorities that the assignee under such circumstances is no longer responsible for the defaults of the assignor, and has greater rights than he,³ yet these cases rest upon the authority of *The Traders' Insurance Company v. Robert*, and the other New York cases following that, all of which, as we have just seen, have been overruled.⁴ And it has even been held that this would be the case where the insurers were notified of the intention of the insured to assign at the time when the policy was issued, to which they assented, but no assignment was actually made till after a loss.⁵ But this case stands alone, and rests upon the same overruled New York cases, and cannot be law. Nor is a transfer of an undivided interest in the property insured to a third party, as by taking in a partner, coupled with the written consent of the insurers that the policy shall remain good to the insured and to the alienee, and an entry by the insurers in their books recognizing such

¹ *Francis v. Butler Mut. Fire Ins. Co.*, 7 R. I. 159. And see *ante*, § 276.

² *State Mut. Fire Ins. Co. v. Roberts*, 31 Pa. St. 438; *Edes v. Hamilton Mut. Ins. Co.*, 3 Allen (Mass.), 362; *Buffalo Steam-Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401; *Lawrence v. Holyoke Ins. Co.*, 11 Allen (Mass.), 387; *Pupke v. Resolute Fire Ins. Co.*, 17 Wis. 378; *Hoxsie v. Prov. Mut. Ins. Co.*, 6 R. I. 517. And see *post*, § 382.

³ *Pollard v. Somerset Mut. Fire Ins. Co.*, 42 Me. 221; *New England Fire & Mar. Ins. Co. v. Wetmore*, 32 Ill. 221; *City Fire Ins. Co. of Hartford v. Mark*, 45 id. 482; *Brush v. Ætna Ins. Co.*, 1 Oldright (Nova Scotia), 458; *Black v. National Ins. Co.*, 24 L. C. Jur. 65 (Q. B.), where the point is very elaborately considered, and the doctrine, opposed to the view stated in the text, is maintained, that by making the loss payable to a third person, that person becomes the party insured to the amount of his interest. Such, indeed, seems to be the French law. The case is an instructive one. See also *ante*, § 294.

⁴ See also *State Mut. Fire Ins. Co. v. Roberts*, 31 Pa. St. 438. The case of *Traders' Ins. Co. v. Robert* was twice afterwards before the court, 9 Wend. 474, and 17 Wend. 631, involving the question of the right of the insured, the assignee and mortgagee having been paid by foreclosure, to proceed against the insurers, and recover his loss, which he was finally permitted to do. All the cases are bad law, though having once held that the mortgagee might recover, it was right that, he having been paid by the mortgagor, the latter should be allowed to recover of the company. Neither, however, should have been allowed to recover. See 6 Bush (Ky.), 268.

⁵ *Charleston Ins. & Trust Co. v. Neve*, 2 McMullan (S. C.), 237.

alienee as a member of the company, an assignment of the policy within the meaning of a provision that the alienee of the property insured, having the policy assigned and ratified to him by the company, should be entitled to all the rights and privileges of the original insured, so as to enable the alienee to sue in his own name.¹

§ 380. **Assignment in whole or in part.** — An assignment of a policy as collateral security avoids a policy which stipulates against an assignment in whole, or of any interest in it, under penalty of forfeiture. The suggestion sometimes made that as such an assignment cannot injure the insurers, it cannot be supposed that the insurers meant to prohibit under such a provision, is not sound. It may injure him in two ways. In the first place, incumbrances are objectionable, and are usually inquired after; for, as they increase, the interest of the owner of the property in its preservation diminishes. True, if honest, he is interested in the payment of his debts. But this is a different interest from that which a man feels in the preservation of the property, — the interest in which insurers are more particularly concerned, — which he can continue to enjoy, and which belongs to him and not to his creditors. Most men will look more vigilantly to the preservation of property which, if saved, they can enjoy, than to the preservation of that which, if destroyed, will merely reduce their ability to pay their debts. If the privilege of transferring the policy as collateral security for goods purchased, or money borrowed, tends to the increase of incumbrances, the company has a motive to prohibit it. That it does so tend is matter of common experience. A mortgage covering the value of the property, accompanied by a transfer of the policy, is worth just as much more in consequence of such transfer as the value of the policy itself. But in another and more important manner does such a transfer injure the insurer. It may create an interest directly hostile to him. If the assignee be a second or third incumbrancer, his interest may be for the destruction of the property. The owner cannot be insured to the entire value, nor a stranger to it to any amount whatever;

¹ See *ante*, §§ 279–280.

since in neither case would there be any interest to preserve, and, in the last case, no interest but to destroy. But this interest of a stranger to destroy may be the same as that of such incumbrancer. If the buildings are preserved, the lien before his will take their value; if destroyed, he will get it; and the circumstances may be such that he will get nothing else, as when the preceding liens cover the entire value of the property. But suppose the property be on account of indebtedness without lien. Then the only way in which it can be of any value is through the destruction of the property.¹

§ 381. **Assignment; Transfer of Interest.**—No transfer of interest will work a forfeiture under the clause contained in a policy forbidding a transfer of “the interest of the assured in the policy, or in the property insured” thereby, without the written consent of the company, which does not so deprive the assignor of all insurable interest as to prevent his recovery on the policy for his benefit if that clause were not contained in it. To take away the cause of action in one case, and to render void the policy in the other, equally require a transfer or *termination* of the entire insurable interest. So long as the insured retains such an interest, that he may suffer loss, the policy protects that interest.² Where the transfer of the entire interest of the insured in the policy, or in the property insured, is forbidden, under penalty of forfeiture, without the consent of the company, if there be a sale of the property insured, but without assignment of the policy to the purchaser, in that case the vitality, or rather activity, of the policy as the means of securing an indemnity becomes suspended; not from any vice in the policy, but for want of any subject-matter to which it may attach. If a fire occurs during the period of suspension, no recovery can be had under the policy; not because it has become void, but because at the time of the fire the insured has no property covered by it,

¹ *Ferree v. Oxford Fire Ins. Co.*, 8 Phila. Rep. 512.

² *Shearman v. Niagara Fire Ins. Co.*, 2 Sweeny (N. Y. Superior Ct.), 470, 474; *Fernandez v. Great West. Ins. Co.*, 3 Rob. (N. Y. Superior Ct.) 458; *Van Deuzen v. Charter Oak Ins. Co.*, 1 id. 55; *Phelps v. Gebhard Fire Ins. Co.*, 9 Bosw. (N. Y. Superior Ct.) 405.

and the purchaser has no policy to cover his interest. The moment, however, the interests become united by the union of the ownership of the property and the interest in the policy in the same person, the policy reattaches to the goods, and becomes valid and effectual to protect the property to which it so reattaches.¹ And where the assignment of the policy, with the consent of the insurers, is absolute to one who has become the entire owner of the subject of insurance, it becomes a new contract of insurance between the underwriters and the assignee. If the assignment, taken in connection with the policy, plainly transfers the assured's whole interest, the underwriter's consent to it is evidently equivalent to the agreement to become directly answerable to the assignee. In such cases the proceedings to enforce payment may be in the assignee's name; and he becomes to all intents and purposes the substituted party to the contract.²

§ 381 *a*. **Assignment; "Interest of the Assured in the Policy."** — In a case where it is provided that the "interest of the assured in the policy" should not be assignable, without consent, and in case of the transfer or termination of the interest of the insured without consent the policy should be void, it was held that the latter interest spoken of is the same as the first, and that an assignment of the policy was an assignment of that interest, was itself null and void, and avoided the policy also.³ But about the same time, and doubtless without having seen the case from New York, Mr. Justice Story, in giving the opinion of the court in *Carpenter v. Providence Washington Insurance Company*,⁴ said that the interest last spoken of was

¹ *Hitchcock v. North Western Ins. Co.*, 26 N. Y. 68; *ante*, § 101.

² *Shearman v. Niagara, &c.*, *supra*. The court rely upon *Hooper v. Hudson River Fire Ins. Co.*, 17 N. Y. 424; *Wolfe v. Security Fire Ins. Co.*, 39 N. Y. 49, 51, both of which were cases of insurance upon stocks of goods kept for sale, and constantly undergoing a change. But the court thought the same rule ought to apply to the insurance of a house. *City Fire Ins. Co. v. Mark*, 45 Ill. 482, was another similar case, which is certainly shaken by *Illinois Ins. Co. v. Fix*, 53 id. 151.

³ *Smith v. Saratoga County Mut. Fire Ins. Co.*, 1 Hill, 497; s. c. affirmed, 3 Hill (N. Y.), 508.

⁴ 16 Pet. 495. This latter opinion is clearly the better law. "Transfer and terminate" is language appropriate to a change in the status of property. At

“manifestly the interest of the owner in the premises insured, and not merely the interest in the policy.”

§ 382. **Assignment by Consent; Assignment with Assent; Legal Effect.** — The purpose for which an assent to the assignment is required is, as we have seen,¹ that the insurers may have an opportunity to know who is to become interested in the policy, and so more or less in the destruction or preservation of the property insured, — the character of the person so interested being oftentimes an important element in the estimation of the risk. It is no part of its purpose to enlarge the engagements of the insurers, nor to waive the conditions on the performance of which their liability depends. It is not to give new privileges to the insured, which without it he would not have, but it is solely for their protection. The assignment does not change the contract. It simply converts one of the parties into a trustee for a third person, and every condition upon which the liability to pay is made to depend remains as before. Were it not so it would not be an assignment, but a new contract.² The legal effect of an assignment to a stranger with the consent of the insurers, by a mortgage, to whom the policy, issued upon the property of the mortgagor, is made payable in case of loss of all his interest in the policy, is not to assign the policy, but merely to hold the insurers to the payment to the assignee in

all events, the doubt should have saved the plaintiff in the New York case. *Ante*, § 143. In *Home Insurance Company v. Lindsey*, 26 Ohio St. 348, where the policy provided that “if any change take place in the title,” . . . “or in case any incumbrance shall fall” on the property insured; . . . “or if this policy shall be assigned . . . without the consent” of the company no recovery could be had, and it further provided that upon certain conditions consent to the assignment would be given, it was held that this consent to the assignment, although the conditions upon which it was to be consented to were complied with, could only be required where consent had been given to the change of title. But the punctuation, given correctly above, would seem to leave it at least doubtful if “consent” in the third clause has any relation to “change of title” in the first.

¹ *Ante* §§ 377, 380.

² *State Mut. Fire Ins. Co. v. Roberts*, 31 Pa. St. 438; *Buckley v. Garratt et al.*, 47 id. 204; *Chishom v. Prov. Ins. Co.*, 20 U. C. (C. P.) 11. In Canada the law upon the point is entirely unsettled. *Black v. National Ins. Co.* (Q. B. Montreal), 3 Legal News, 29.

case of loss, whatever the person originally insured by the policy may be entitled to receive. It is only a contingent order or assignment of what may become due under the contract, and not an absolute transfer by virtue of which the assignee acquires the full rights of an assignee of a *chose in action*. The original contract with the mortgagor still subsists, and it is his interest which is insured. The assignee must claim in his right, and not in his own. It is only what the mortgagor may have a right to receive under the contract that the assignee can in any event claim. If, therefore, the mortgagee, before the loss happens, violates a provision of the policy, whereby he forfeits the right to recover, his assignee is equally barred of his remedy.¹

§ 383. **Assignment; What is an Assent; Notice.** — The assent to an assignment of the policy by the secretary of the insurers is sufficient, unless prohibited by the charter or by-laws. He will be presumed to be acting within the scope of his authority in so doing; and this is true, although by the charter policies must be signed by the president.² So, where the assent and approval of the directors is requisite to the validity of the assignment of a policy, and it is brought to their knowledge that the secretary has assented to such assignment, by an entry of the fact in the company's books and an indorsement upon the policy, this will be a sufficient assent and approval on the part of the directors, and a formal vote is not necessary.³ The habit of the president or secretary giving such assent, known to the directors, and not objected to by them, is equivalent to an express vote.⁴ Indeed, that any particular officer of the company has been in the habit, known to the directors, of attending to any particular branch of the business, or of doing any particular class or kind of acts in the management of the business, is enough to give the acts validity, as done with the assent and approval

¹ *Hale v. Mechanics' Mut. Fire Ins. Co.*, 6 Gray (Mass.), 169; *ante*, § 379.

² *New England Mar. Ins. Co. v. De Wolf*, 8 Pick. (Mass.) 56; *Buchanan v. Exchange Fire Ins. Co.*, 61 N. Y. 26.

³ *Durar v. Hudson County Mut. Ins. Co.*, 4 Zab. (N. J.) 171.

⁴ *Phillips v. Merrimack Mut. Fire Ins. Co.*, 10 Cush. 350.

of the directors, there being no stipulation or rule known to the party who sets up the validity of the act that such assent must be in writing;¹ and an agent of the insurers may bind the company by a verbal assurance that the policy will remain good after transfer of title till a certificate of consent to an assignment of the policy can be obtained from the company, though the transfer without consent in writing avoids the policy.² So, if the secretary informs the insured that he need not forward his policy for indorsement.³ And consent to an assignment to a vendee, after forfeiture for non-payment of assessments of which he was ignorant, is a waiver of the forfeiture.⁴

§ 384. **Assent; Waiver.**—A designation in the policy of the payee has been held to be the equivalent of an assent, required to be by indorsement on the policy, to an assignment so as to prevent a forfeiture on account of a subsequent assignment;⁵ and such a designation written across the face of the policy is the equivalent of an assignment, or rather renders an assignment and notice unnecessary in order to keep alive the policy after forfeiture by alienation.⁶ And insurance of partnership property is an assent to all such changes in the relation of the individuals of the firm to the property, whether by death or dissolution, as by law follow such events.⁷ And in some cases, it has been held that the issuing a policy payable to a third person is tantamount to an assent in advance to the assignment;⁸ and so, also, that the indorsement of the same provision has the same effect.⁹ Where the insured held an intermediary receipt, and gave

¹ *Topping v. Bickford*, 4 Allen (Mass.), 120.

² *Illinois Mut. Fire Ins. Co. v. Stanton*, 57 Ill. 354; *Parsons v. Standard Ins. Co.*, Sup. Ct. 16 Can. L. J. 271. See also *ante*, §§ 369, 370.

³ *Stolle v. Ætna Ins. Co.*, 10 W. Va. 546.

⁴ *Hale v. Union Mut. Fire Ins. Co.*, 32 N. H. 295.

⁵ *National Fire Ins. Co. v. Crane*, 16 Md. 260.

⁶ *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523.

⁷ *Wilson v. Genesee County Mut. Ins. Co.*, 16 Barb. (N. Y.) 511.

⁸ *Brown v. Roger Williams Ins. Co.*, 5 R. I. 394; *Bidwell v. St. Louis Floating Dock Ins. Co.*, 40 Mo. 42.

⁹ *National Fire Ins. Co. v. Crane*, 16 Md. 260; *Franklin v. National Ins. Co.*, 43 Mo. 491.

verbal notice before he renewed his policy to the agent of the company that he had assigned the property insured for the benefit of his creditors, this was held sufficient, though the policy afterwards issued made it requisite that such assignment of property should be consented to in writing.¹ If the consent be required before the assignment, subsequent consent waives the forfeiture.²

But an assent to an assignment after forfeiture because of alienation does not restore a policy originally void on other grounds. The authority conferred by the by-laws of a mutual insurance company upon the directors to ratify and confirm assignments in cases of the sale or alienation of the property insured applies only to policies which are made void by such alienation, and not to such as were originally void; and the assent, therefore, to the assignment of a policy originally void, after an alienation and for the purpose of ratifying it, does not cure the original infirmity in the policy.³ It has also been held that where the by-laws require that the assignment of the policy shall be made within thirty days, an assent afterwards by the agent, without any substantial new consideration, is ineffectual to restore the policy.⁴

§ 385. **Assignment; Consent in Writing; Fraud.** — If the assent to an assignment be procured by fraud, it is, like all other contracts thus procured, voidable, and may be repudiated. But if, after knowledge of the fraud, it is treated by the insurer as a valid assignment, as by demanding and receiving assessments for losses and expenses subsequent to the fraud from the assignee, this will waive the fraud; but a failure to state the interest of the assignee, certainly if not asked, is no fraud.⁵ If the assent to the assignment is, by the terms of the policy, to be in writing, it must be strictly complied with,

¹ *Parsons v. Standard Fire Ins. Co.* (Can. Sup. Ct.), 16 Can. L. J. 271 (1880). See also *Hatton v. Beacon Ins. Co.*, 16 U. C. (Q. B.) 316.

² *Shearman v. Niagara Ins. Co.*, 46 N. Y. 526.

³ *Eastman v. Carrol County Mut. Fire Ins. Co.*, 45 Me. 307; *Citizens' Fire Ins. Co. v. Doll*, 35 Md. 89. But see *City Fire Ins. Co. v. Mark*, 45 Ill. 482.

⁴ *American Ins. Co. v. Gallagher*, 50 Ind. 209.

⁵ *Cumberland Valley Mut. Prot. Ins. Co. v. Mitchell*, 48 Pa. St. 374. And see *post*, chapter on Waiver and Estoppel.

unless there be a waiver; and knowledge that an assignment is contemplated by the assured, the mortgagor, to the mortgagee, without objection, is no consent. The only fair inference from such facts is a tacit agreement that the company would consent when the mortgagee had put himself in a position to ask it.¹ If its validity be dependent upon depositing a note with the secretary or agent, to be approved by the directors, leaving the note with the agent, who neglects to notify the company, is not a compliance with the conditions;² and if the charter requires that the assignment be recorded and certified on the policy, it has been held to be essential to its validity that these requirements be complied with.³ But this is very strict law; and it may be doubted if, when the insured has done all in his power to comply with the conditions, and the agent is negligent, the company is not liable.⁴ If the policy require notice of the assignment to the secretary in writing, and the indorsement thereof on the policy or other written acknowledgment by him, the assignment written on the policy, and underneath it the name of the agent, "for secretary," will suffice, if such has been the practice of the agent, known to the company.⁵ And if the local agent of the company draws up the assignment, and the general agent assents to it in writing, it is an assent by the company, both to the assignment, and to the accompanying transfer of property.⁶

[§ 385 A. **Consent in Writing; Indorsement.** — An assignment by writing on the policy *attested* by the agent is a sufficient compliance with the provision as to written consent of the company.⁷ An assent to an assignment by the president

¹ *Smith v. Saratoga County Mut. Ins. Co.*, 3 Hill (N. Y.), 508.

² *Fogg v. Middlesex Mut. Ins. Co.*, 10 Cush. (Mass.) 337.

³ *Bayles v. Insurance Co.*, 3 Dutch. (N. J.) 163.

⁴ See *ante*, § 370; *post*, § 387; *Batchelor v. People's Ins. Co.*, 40 Conn. 56. The insurer cannot set up its own negligence to do that which it alone can do, and has no reasonable excuse for not doing, as a defence against liability. *Farmers' Ins. Co. v. Wenger* (Pa.), 8 Ins. L. J. 712.

⁵ *Farmers' Mut. Fire Ins. Co. v. Taylor*, 73 Pa. St. 342.

⁶ *Hazzard v. Canada Agr. Ins. Co.*, 39 U. C. (Q. B.) 419.

⁷ *[New Orleans Ins. Ass. v. Holberg]*, 64 Miss. 51.]

of the company, on a piece of paper attached by a wafer to the policy is sufficient for an "indorsement on the policy."¹ Where the property was assigned March 4, the policy renewed March 21, and, April 15, was transferred to the assignee of the property with the company's consent, it was claimed that the assignment of the property, being *prior* to the company's consent, vitiated the policy, and the subsequent transactions could not revive it, being once dead. The court held, however, that the policy had not become void beyond revival, as it would in case it were illegal or against public policy, and that the recognition of it by the company gave it new life.² But where A. purchased some insured property of B., took an assignment of the policy, and went to the agent to get it indorsed as required. The agent promised to do so if the grantee would bring the policy. This was not done until after fire. It was held that the verbal promise could not be enforced. There is no waiver, no lulling of the assignee into security, and the condition of the policy against alienation without indorsement applies.³ A condition in a policy issued by a mutual company established for the protection of the members, their families and heirs, that it shall not be assigned without written assent of the company, is valid; and even receipt of assessments from the assignee after death of the insured will not constitute a waiver of the condition. The assessments might properly be paid by any one as a volunteer.⁴ A policy issued to G. provided that it should be void if assigned for collateral security. For that purpose it must be made payable to the new party by indorsement on its face. There was an assent by the agent of the company "that the interest of G. in the within policy . . . be assigned to A.," and an assignment by G. of "all his title and interest in the policy" to A. This assignment was in fact for collateral security; but the agent did not know this, or give A. any reason to suppose he knew it, and he had no authority to assent to an assign-

¹ [Penn Ins. Co. v. Bowman, 44 Pa. St. 89 at 91.]

² [Shearman v. Niagara Fire Ins. Co., 46 N. Y. 526.]

³ [Equitable Ins. Co. v. Cooper, 60 Ill. 509 at 510.]

⁴ [National Mut. Aid Soc. v. Lupold, 101 Pa. St. 111.]

ment of that kind. It was held that A. could not maintain an action on the policy.¹]

§ 386. **Assignment after Loss; Bankruptcy.** — But this inhibition of an assignment without consent applies only to an assignment before the loss. An assignment after the loss is not the assignment of the policy, but the assignment of a claim or debt, a *chose in action*, which is always assignable in equity, — subject, of course, to all equities and claims in set-off that would be enforceable against the assignor.² [And an assignee *after* loss stands in the shoes of the assignor as to violations of the conditions of the policy by the assignor.³ An order on the company after loss by the assured for the whole amount of the policy is an assignment, and is valid without an acceptance.⁴ An assignment after loss does not violate the clause in the policy forbidding a transfer,⁵ even if the clause reads “before or after loss.” The reason of the restriction is that the company might be willing to write a risk for one person of known habits and character, and not for another person of less integrity and prudence, but after loss this reason no longer exists.⁶ Nor is such an assignment within the condition *requiring* consent of the company.⁷ Specific performance of an assignment

¹ [Lynde v. Newark Ins. Co., 139 Mass. 57.]

² Brichta v. New York Lafayette Ins. Co., 2 Hall (N. Y. Superior Ct.), 372; Perry v. Merchants' Ins. Co., 25 Ala. 355; Mellen v. Hamilton Fire Ins. Co., 5 Duer (N. Y. Superior Ct.), 101; s. c. 17 N. Y. 609; Hughes v. Mut. Fire Ins. Co. of Newcastle, 9 U. C. (Q. B.) 387; Wilson v. Hill, 3 Met. (Mass.) 66; Sadler's Co. v. Badcock, 2 Atk. 554; Courtney v. New York City Ins. Co., 28 Barb. 116; Carter v. Humboldt Fire Ins. Co., 12 Iowa, 278; Carroll v. Charter Oak Ins. Co., 38 Barb. (N. Y.) 402; s. c. 40 id. 292; Green v. Republic Ins. Co. (N. Y.), 10 Ins. L. J. 422; Archer v. Merchants' & Manufacturers' Ins. Co., 43 Mo. 434; Dogge v. Northwestern Ins. Co., 49 Wis. 501. So in case of reinsurance. Real Estate Ins. Co. v. Cashow, 41 Md. 59; Combs v. Shrewsbury Ins. Co. (N. J.), 23 Alb. L. J. 98; [Rousset v. Insurance Co. of N. A., 1 Binn. 429 at 435; Gourdon v. Insurance Co. of N. A., 3 Yeates, 327 at 334.]

³ [Bonenfant v. Insurance Co., 76 Mich. 654.]

⁴ [Hall v. Dorchester Ins. Co., 111 Mass. 53 at 54.]

⁵ [Mellen v. Hamilton Ins. Co., 17 N. Y. 609 at 615.]

⁶ [Rennebaker v. Tomlinson, 1 Tenn. Ch. 598 at 601; Nease v. Aetna Ins. Co., 18 Ins. L. J. 541 (W. Va.), March, 1889.]

⁷ [Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460, 473.]

after loss will be decreed in spite of a prohibition in the policy. Such a prohibition is illegal.¹ In Michigan the right of assignment of a policy after loss is secured by statute,² and no condition in the policy providing for forfeiture by assignment without consent can apply to prevent assignment after loss. After loss an assignment of the right of action is good without record or delivery of the policy as against a subsequent garnishment.³ And a prohibition of an assignment after the loss is invalid, and void as contrary to law.⁴ An assignment before loss, as collateral, will indeed give the assignee, though he have no interest in the insured property, an equitable lien upon the proceeds as against the assignor, without regard to the consent of the insured.⁵ Nor is a general assignment in bankruptcy a violation of the condition.⁶

If the loss, however, be only partial, and the policy still further protects, the prudent course will be to assign only the claim for loss; and perhaps out of abundant caution this would be the better course in case of total loss.⁷

§ 387. **Assignment; Limitation as to Time; Consent arbitrarily withheld.** — *Boynton v. Farmers' Mutual Insurance Company* was a case where the policy provided that upon alienation of the property the policy should be void, but that the alienee having the policy assigned might have the same ratified and confirmed to him upon application to the directors and with their consent, within thirty days next after the

¹ [*Spare v. Home Mut. Ins. Co.*, 17 Fed. Rep. 568, 9th Cir. (Or.) 1883, 12 Ins. L. J. 864.]

² [*Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252 at 254.]

³ [*Aultman v. McConnell*, 34 Fed. Rep. 724 (Iowa), 1888.]

⁴ *Goit v. Nat. Prot. Ins. Co.*, 25 Barb. (N. Y.) 189; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; *Carroll v. Charter Oak Ins. Co.*, 38 Barb. (N. Y.) 402. *Contra*, *Dey v. Poughkeepsie Mut. Ins. Co.*, 23 Barb. (N. Y.) 623.

⁵ *Bibend v. Liverpool, &c. Ins. Co.*, 30 Cal. 78; *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. 42; *Prows v. Ohio, &c. Ins. Co.* (Sup. Ct. Cincinnati), 4 Ins. L. J. 639. [If the assured assigns his interest in insured goods before loss, he cannot sue upon the policy except as trustee for the assignee, if the policy permits. *Powles v. Innes*, 11 M. & W. 10 at 13.]

⁶ *Fayette Co. Ins. Co. v. Neel* (Pa. St.), 8 Ins. L. J. 265; *ante*, § 379; *Appleton Iron Co. v. British Am. Ass. Co.*, 46 Wis. 23; *Starkweather v. Cleveland Ins. Co.*, 2 Abb. (U. S.) 67.

⁷ *Kerr v. Hastings Mut. Fire Ins. Co.*, 41 U. C. (Q. B.) 217.

alienation, upon certain terms. After alienation and assignment and loss, but within the thirty days, the assignee presented the assignment for ratification, and offered to comply with the usual terms, and it was held on a bill in equity that the company could not arbitrarily and without cause refuse, and a decree was entered in favor of the assignee for the same amount as the grantor could have recovered if there had been no alienation.¹ We have before seen that where a contract has been made between the applicant for insurance and the agent of the insurers, subject to the approval of his principal, that approval cannot be withheld without reason.² Application to an insurance company for its consent to the assignment of the policy is tantamount to notice by the applicant of the acquisition, contemplated or actual, by him of an interest in the property insured, as without that the assignment would be valueless.³

§ 388. **Life Policy ; Assignment.** — The reasons which lead to caution as to the assignment of policies in fire insurance⁴ do not exist to the same extent in life insurance. There may indeed be cases where they would apply, but they occur so seldom that generally, almost universally, the claims arising out of life policies are recognized as assignable either absolutely or by way of security, without the assent of the insurers. Even notice is not always required ; and, when required, is only necessary to protect the company from the possibility of being obliged to pay both the assignee and the legal representatives. Indeed, in the case of a policy for life, the payment cannot be made to the insured ; and in fire, also, the policy runs to the legal representatives and assigns. Much of the usefulness of life insurance depends upon the mobility of

¹ 43 Vt. 256. See also *ante*, §§ 57, 135 ; *Durar v. Hudson Co., &c. Ins. Co.*, 4 Zab. (N. J.) 171 ; *Wakefield v. Orient Ins. Co.* (Wis.), 10 Ins. L. J. 250 ; *Westlake v. St. Lawrence, &c. Ins. Co.*, 14 Barb. (N. Y.) 206. But see *Girard Fire Ins. Co. v. Hebard* (Pa.), 10 Ins. L. J. 425, where it is said that the assignment without consent works a forfeiture, and the policy is no longer of avail, whether the insurers declared the forfeiture or not, unless they do some act to revive it.

² *Ante*, §§ 57, 370. And see also *Illinois Mut. Ins. Co. v. Stanton*, 57 Ill. 354.

³ *Hooper v. Hudson River Fire Ins. Co.*, 3 Smith (N. Y.), 424.

⁴ *Ante*, §§ 377 *et seq.*

policies, and the companies have for obvious reasons been desirous to promote that end,—a desire which the courts have been willing to encourage, so far as consistent with legal principles.¹ It has accordingly been held that where the promise is to “the assured, his executors, administrators, and assigns,” to pay the “legal representatives” of the assured, the policy is nevertheless assignable, and that the provision to pay the legal representatives was designed to apply only to a case where the insured died without having previously assigned the policy, and was not to be construed in any sense as limiting the power of the party insured to assign.² So an assignment by a husband to his creditor, out of the proceeds to pay the debt, and the remainder to be paid to the widow, was held to take the whole interest to the assignee for himself and in trust, as against the administrator.³

§ 389. **Life Policy ; Requisites of a Valid Assignment.** — The requisites to a valid assignment of a life policy have been thus well stated by Shaw, C. J. :⁴ —

“According to the modern decisions, courts of law recognize the assignment of a *chose in action*, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the name of the assignor, and recover a judgment for his own benefit. But in order to constitute such an assignment, two things must concur : first, the party holding the *chose in action* must, by some significant act, express his intention that the assignee shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee, or to some person for his use, the security, if there be one, bond, deed, note, or written agreement, upon which the debt or *chose in action* arises ; and,

¹ New York Life Ins. Co. *v.* Flack, 3 Md. 341 ; Anthracite Coal Co. *v.* Sears, 109 Mass. 383.

² *Ibid.*

³ McCord *v.* Noyes, 3 Bradf. 139 ; Harrison *v.* McConkey, 1 Md. Ch. 34. As between the assignor and the insurers the contract remains unchanged, and the assignee can claim no greater right than the assignor could. A breach of condition by the assignor avoids the policy. British Eq. Ins. Co. *v.* Great West. Ins. Co., 38 L. J. Ch. 132 ; s. c. 3 Big. Life & Acc. Ins. Cas. 264.

⁴ Palmer *v.* Merrill, 6 Cush. (Mass.) 282. And see *post*, § 395.

secondly, the transfer shall be of the whole and entire debt or obligation in which the *chose in action* consists, and as far as practicable place the assignee in the condition of the assignor, so as to enable the assignee to recover the full debt due, and to give a good and valid discharge to the party liable.¹

“The transfer of a *chose in action* bears an analogy, in some respect, to the transfer of personal property; there can be no actual manual tradition of a *chose in action*, as there must be of personal property, to constitute a lien, but there must be that which is similar, a delivery of the note, certificate, or other document, if there is any, which constitutes the *chose in action*, to the assignee, with full power to exercise every species of dominion over it, and a renunciation of any power over it on the part of the assignor.

“The intention is, as far as the nature of the case will admit, to substitute the assignee in place of the assignor as owner. A man cannot by his own act charge a personal chattel, a carriage and horses, for instance, with a lien in favor of a particular creditor, and yet retain the dominion and possession of them till his death; *a fortiori*, where he retains the memorandum or instrument of transfer of such chattel in his own possession and under his own control. It seems to us equally impracticable to charge a debt due to him, by an order or memorandum retained in his own possession, purporting to give to a particular creditor an equitable lien to the assignment of such *chose in action*, without a transfer or delivery of the security by which it is manifested.”

§ 390. **Disposition of Proceeds; Conflicting Claims; Creditor and Administrator.** — As a general rule, the proceeds of a life insurance must go as agreed upon and directed in the policy; and no diversion or agreement for a diversion will be effectual without the consent of him to whom the proceeds are by the original policy directed or agreed to be paid. When the policy issues, the rights of the beneficiaries become vested, and on their receipt alone can the loss safely be paid. [The com-

¹ Getchell v. Maney, 69 Me. 442; Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609.

pany cannot set up the breach of a statute made for the protection of creditors of the insured. In consequence of the statute the plaintiff may hold the proceeds partly in trust for such creditors, but the company cannot set up the equities of others to defeat an action on the policy.]¹ And none but those having a right to the policy and its proceeds can surrender it,² or create any charge upon it.³

An endowment policy payable in ten years to the insured, his heirs or assigns, or in case of his decease before the expiration of ten years to his wife, belongs to his estate if he live till the endowment becomes payable,⁴ or if he become bankrupt.⁵ The wife's rights do not attach till the decease of the husband within the time limited.⁶ Having once attached, however, she cannot be deprived of them.⁷

In Canada, by statute 29 Vict. ch. 17, the loss must be paid as directed in the policy, and cannot be subjected to the claims of creditors, unless so directed.⁸ So in Louisiana.⁹ And if without the consent of the wife the policy be suffered to lapse, and a new one be taken out by the husband, payable to his representatives, which he assigns to pay his debts, the wife will be entitled to the proceeds of the original policy, less the premiums and interest due from her on the same.¹⁰ So in Tennessee, if not otherwise directed by the code.¹¹ And

¹ *Smith v. Mo. Valley Ins. Co.* (U. S.), 6 Ins. L. J. 394; 4 Dill. C. Ct. (Mo.) 353; *Pullis v. Robinson* (Mo.), 12 Repr. 144; *Diedrich v. Northwestern Ass. Co.*, 47 Wis. 662; *post*, § 391.

² *Stillwell v. Mut. Life Ins. Co.*, 72 N. Y. 385.

³ *Brooks v. Phoenix Mut. Life Ins. Co.*, C. Ct. (Vt.), 8 Ins. L. J. 740.

⁴ *Tenness v. Northwestern, &c. Ins. Co.* (Minn.), 9 Ins. L. J. 191.

⁵ *Stevens v. Lane* (C. Ct. Mass. 1878); *Brigham v. Home Ins. Co.* (Mass. 1881), 12 Repr. 180.

⁶ *Evers v. Life Ass.*, 59 Mo. 429; *Fowler v. Butterly* (N. Y.), 9 Ins. L. J. 329. But see *Herrick v. National Life Ins. Co.*, C. Ct. (Vt.) 5 Ins. L. J. 80. See also *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 157.

⁷ *Brockhaus v. Kemna* (Wis.), 12 Repr. 168.

⁸ *Brossard v. Massouin*, Supr. Ct. (Montreal), 4 Ins. L. J. 395.

⁹ *Succession of Hearing*, 26 La. An. 326.

¹⁰ *Pilcher v. New York Life Ins. Co.* (La.), 10 Ins. L. J. 312. See also *Ricker v. Charter Oak Ins. Co.* (Minn.), 10 Ins. L. J. 143; *Herrick v. National Life Ins. Co.*, C. Ct. (Vt.), 5 Ins. L. J. 80.

¹¹ *Harrington v. Traders' Bank* (Tenn.), 9 Repr. 358.

as between creditors and an intended, though not named, beneficiary, in possession of the policy, the latter will be permitted to hold the funds, if the facts show that the policy really was his, and the whole proceeding was for his benefit.¹ Where A. ordered a new policy on his own life to be made, substituting one beneficiary for another, which was done, and the delivery was made to him instead of the new beneficiary, it was held that A. had no rights under the old policy, contrary to his claim that there had been no delivery to the beneficiary of the new.² Where a wife insured the life of her husband for the benefit of herself, or, in case of her decease, of her children, and she died before her husband, and also one of the children died before him, leaving a child, it was held that a transmissible interest vested in the children on the issuing of the policy, and that the grandchild took by descent the interest of its parent.³ If the wife insures for herself alone, and dies before her husband, the interest descends to her heirs.⁴ Where the policy permits disposition of the fund by will, otherwise to go to the widow, and if no widow, "to the heirs and legal representatives," this last means the next of kin, and takes the fund out of the decedent's estate.⁵ If there be a failure to direct how the funds are to be disposed of in case of decease of the beneficiary, and it appears that the general object is "to establish a widows' and orphans' fund," the widow is "entitled to" the fund, and not the creditor, the children having deceased before the insured.⁶ Where the charter provided that the loss might be payable to a "person desig-

¹ *Worthington v. Curtis*, 1 Ch. D. 419; s. c. 5 Big. Life & Acc. Ins. Cas. 740; s. c. 5 Ins. L. J. 470. By the Iowa Code, §§ 1182, 2372, the avails of policy of life insurance are part of the estate of the beneficiary, and subject to his debts, but not to those of the "deceased,"—that is, the life insured. *Murry v. Wells* (Iowa), 9 Ins. L. J. 649; *Smedly v. Felt*, 48 Iowa, 607.

² *Crittenden v. Phoenix, &c. Ins. Co.*, 41 Mich. 442.

³ *Continental Life Ins. Co. v. Palmer*, 42 Conn. 60; *Robinson v. Duvall* (Ky.), 9 Ins. L. J. 897.

⁴ *Hutson v. Merrifield*, 51 Ind. 24.

⁵ *Hodges' Appeal* (Pa.), 9 Ins. L. J. 709. *Contra*, in Georgia, *Rawson v. Jones*, 25 Ga. 458. See also *Wason v. Colburn*, 99 Mass. 342.

⁶ *Ballou v. Gile*, 50 Wis. 614. See also *Duvall v. Goodson* (Ky.), 9 Ins. L. J. 901; *Kentucky, &c. Ins. Co. v. Yates*, id. 572.

nated," with a proviso that the insured should have no power to deprive wife and children of benefits, and the person designated was a niece, it was held good to the niece, and that the proviso applied only to such funds as would by law descend to legal representatives.¹ A policy payable to the wife, or, in case of her decease, to the children, there being no children, becomes the absolute property of the wife, and she may even, after a divorce, exchange it for a new paid-up policy.² She has, in Massachusetts, a life interest, which is absolute, if the children are not mentioned, and which she may assign to secure her husband's debts.³ In the case the learned judge (Lowell) points out that the fact that the New York statute does not protect creditors against fraud, while the Massachusetts and most of the other statutes do, may account for the discrepancies between the decisions in New York and the other States.⁴

A case of some novelty occurred recently in Massachusetts, where an insurance company in that State insured the life of a citizen of another, and the insured assigned the policy to a creditor resident in the first State. After death, the administrator at the domicile of the insured brought suit; but subsequent thereto the assignee of the policy was appointed ancillary administrator at the domicile of the creditor, and brought suit; and it was held that the first suit was no bar to the second, and that the right of the ancillary administrator, representing as he did the equitable interest of the assignee, and the legal capacity to sue, was superior to that of the original administrator.⁵ In this case the court say:—

"There was a right of possession in the assignee superior to that of the intestate or his administrator, and which he might pass over to the administrator in Massachusetts upon

¹ Penn Mut. Relief Ass. v. Folmer, 87 Pa. 133.

² Phoenix Mut. Ins. Co. v. Dunham, 46 Conn. 79. See also Keller v. Gaylor, 40 Conn. 343.

³ Newcomb v. Mutual Life Ins. Co., C. Ct. (Mass.), 9 Ins. L. J. 124.

⁴ See also Emerick v. Coakley, 35 Md. 188; Archibald v. Mut. Life Ins. Co., 38 Wis. 542. See also *post*, § 392.

⁵ Merrill v. New England Mut. Life Ins. Co., 103 Mass. 245.

such terms as he saw fit, consistent with his limited rights. His interest in the policy is not a mere order for a part of the proceeds, but extends to the whole policy alike. With his concurrence the auxiliary administrator may maintain a suit and collect the proceeds of the policy. Without it, neither he nor the principal administrator could control the possession or collect the proceeds. The pledge makes it no longer a question of jurisdiction, as affected by priority of suit, comity between the States, or otherwise, but one merely of the right of the respective parties claiming an interest in the policy. The right of the plaintiff in this suit is superior to that of the principal administrator in Illinois, because he represents the equitable interest and right of immediate possession and control of the pledgee, as well as the legal capacity to sue, which remains in the representatives of the estate of the insured. That legal right to sue is held by the administrators of the insured, wherever appointed, in trust for the benefit of the equitable assignee of the claim. The assignee is entitled to control any suit brought for its recovery. His right would be protected by the courts against any attempt of the administrator to collect or release the demand in disregard of his interests. Upon the same principle, it would be equally protected against prejudice from any attempt to anticipate him by means of a suit instituted by such administrator in his own behalf, and without recognition of the rights of the assignee. .

“ Within the same jurisdiction the respective rights of the assignor and assignee may be readily adjusted, and suits controlled. The difficulty arises from the existence of suits in separate and independent jurisdictions. There is a class of decisions, referred to by the defendant, particularly affecting questions of jurisdiction between the federal and State courts, to the effect that a subject-matter once brought within the jurisdiction of a court of general jurisdiction, whether by suit *in personam* or proceeding *in rem*, or even by process of attachment, is in the custody of that court, and cannot be withdrawn or controlled by any process or proceeding of any other court; but that doctrine is explained and narrowly limited by

Mr. Justice Miller, in *Buck v. Colbath*.¹ It does not apply to this case, for reasons already indicated, because the policy, having been pledged and delivered to another in the lifetime of the intestate, was never in the legal possession of his administrator in Illinois, and therefore was never properly brought within the jurisdiction of the courts in that State, either as assets subject to administration, or as a cause of action which the administrator there could maintain. He could not, by commencing a suit there, transfer to those courts the determination of the rights of the pledgee, so as to compel him to seek them by intervening in such suit. The pledgee has an independent title, accompanied by possession of the policy, and by bill in equity in his own name, or by suit in the name of the administrator in Massachusetts, could enforce his claim. Neither the administrator in Massachusetts nor the administrator in Illinois would be allowed to defeat the prosecution of such a suit."

§ 391. **Life Policy; Assignment by Married Woman; Rights of Children.**—The power of a married woman over a policy on the life of her husband, payable to her, her executors, administrators, or assigns, to her sole use, in case of his death before the wife's, but payable to the children in case of her decease before the husband, the premiums being paid by her, has been frequently before the courts; and in *Eadie v. Slimmon*² it was held that such a policy was unassignable. This was under the law of 1840,³ in which it was provided that if the wife survived her husband, the amount payable should be payable to her for her own use, free from all claims of her husband's representatives or of his creditors, and giving authority also to provide for the children in case of her death. "The act," said the court, "looks to a special provision for a state of widowhood and for orphan children, and it would be a violation of its spirit to hold that a wife could sell or traffic with her policy as though it were real and personal property, or an ordinary security for money." In this case the wife survived her husband. And this case was

¹ 3 Wall. 334.

² 26 N. Y. 9.

³ Of New York.

followed in *Secor v. Dalton*,¹—a case where the wife died before the husband. And in Connecticut, in a case similar to the last, and under a similar statute, the same doctrine was laid down.² And in answer to the suggestion that the clause in the policy making it payable to the children was simply the indication of her purpose at that time to give the sum specified in the policy to them in case she deceased before her husband, and that it must be regarded as her expressed but unexecuted intention to give this sum to the children, which intention she could abandon at her pleasure, the court say: "The argument is ingenious, but not sound. The intention was not to give a sum of money to the children, but to make a life policy in a certain event payable to them. The intention was not only expressed but executed. The contract was complete, and the money when due was payable to the children without any further act on her part." By the terms of the policy "it was payable to her only in case she survived her husband; and in case her husband survived her, . . . to the children." Referring to *Eadie v. Slimmon*,³ the court say: "The reasoning of the court goes so far as to hold that a policy of this description, prior to the decease of the husband, is absolutely and under all circumstances unassignable by the wife. That such should be the law under a policy, the premiums on which were paid by the husband, certainly seems reasonable and just; while, on the other

¹ Cited in Bliss, *Life Insurance*, 528. So it was followed in *Barry v. Equitable Life Ass. Soc.*, 59 N. Y. 587. But in *Robinson v. Mutual Benefit Ins. Co.* it was held that the wife might assign such a policy as collateral, to secure funds with which to keep it alive, as this was in furtherance of the purposes of the statute. C. Ct. (N. Y.), 9 Ins. L. J. 23. In *Brummer v. Cohen* an endowment policy was held to be within the statute. C. C. P. (N. Y.), 9 Ins. L. J. 160. But see *Anderson v. Butterly* (N. Y. Sup. Ct.), 8 Ins. L. J. 80; s. c. affirmed, 9 Ins. L. J. 329, and note. The parties in *Barry's* case, *supra*, were in the State courts of Maryland, where the law permits an assignment, and also in the Circuit Court of the United States for Maryland. See *Barry v. Mut. Life Ins. Co.*, 3 Ins. L. J. 74; *National Life Ins. Co. v. Barry*, 4 Big. Life & Acc. Ins. Cas. 109; s. c. affirmed, *sub nom.* *Whitridge v. Barry*, 42 Md. 140. It is now understood to be the law in New York, the statute having been so amended that such a policy may be assigned by the wife.

² Conn. Mut. Life Ins. Co. v. Burroughs, 34 Conn. 305.

³ *Supra*.

hand, if the wife paid the premiums out of her separate estate, it is difficult to suggest a reason why she should not have the same power to assign her interest in the policy that she has to assign any other *choses in action* belonging to her. As, however, the death of the wife occurred in the case under consideration before that of the husband, and was the precise event upon which the policy was made payable to the children, no decision was made upon either of those points." And both courts thought the assignee ought to be allowed out of the proceeds the amount of the premiums he had paid; as also in the case of *Chapin v. Fellowes*.¹ And in Massachusetts, also, under a substantially similar statute, where the wife effected the insurance and paid the premiums, and died before her husband, the same conclusion has been reached,² and for the same reasons.³ In *Moehring v. Mitchell*, just cited, the question was whether the wife could dispose of such a policy by will, and it was held that she could not, even with the consent of her husband. But in *Kerman v. Howard*⁴ it was held that a husband who effects a policy, payable to his wife or her legal representatives, and pays the premiums and survives his wife, may, after her decease, dispose of the policy by will so as to dispose of the proceeds of the policy among the children of his former wife as against the children of his last wife by a former husband. The report does not show that there was any provision in the policy for the benefit of children in case of survivorship of the husband, but the statute was similar to that of Massachusetts, except in the last clause.⁵ And in the same State a

¹ 36 Conn. 132.

² *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 157. And see also *Burroughs v. State Mut. Life Ass. Co. of Worcester*, 97 Mass. 359.

³ The court cite *Eadie v. Slimmon*, Conn. Mut. Life Ins. Co. v. *Burroughs*, *Moehring v. Mitchell*, 1 Barb. (N. Y.) Ch. 264, and *Swan v. Snow*, 11 Allen (Mass.), 224.

⁴ 23 Wis. 108.

⁵ The statute of Wisconsin is as follows: "Any policy of insurance made by any insurance company on the life of any person expressed to be for the benefit of a married woman, whether the same be effected by such married woman, or by her husband, or by any other person on her behalf, shall inure to her sole and separate use and benefit, and that of her children, if any, independently

father may assign a policy procured upon his own life, at his own expense, in favor of a minor. Such a case seems not to be within the words of the statute.¹ So may a wife assign a policy on her husband's life for her benefit.² And in a very late case the same court reaffirms the doctrine that where one procures a policy on his own life for the benefit of another, and pays the premiums thereon, he may dispose of it by will or otherwise, to the exclusion of the beneficiary named in the policy, suggesting, however, that the beneficiary may have an interest subject to such rights of the insurer.³ Still the doctrine stated heretofore,⁴ that with the execution and delivery of the contract the beneficiary's interest becomes vested and passes beyond the control of the insured, must be considered as supported by the great weight of authority.⁵ In Illinois, though a policy applied for and issued to the wife, payable to her and her assigns, is not assignable, yet as it is under the statute of that State concerning the property of married women her sole and separate property, she may, by an assignment, pledge the whole or any part of the proceeds, and the assignment will be enforced against her in equity.⁶ And in Missouri, if a husband takes out a policy for the benefit of his wife and pays the premium, and both afterwards join in an assignment of the policy to secure a loan, the assignment will be upheld, especially if it also

of her husband, and of his creditors and representatives, and also independently of any other person effecting the same in her behalf, his creditors and representatives; *and in case of the death of the husband of such married woman, such policy and the benefit thereof shall not go to his executors or administrators, but shall belong to such married woman, and shall be for her sole use and benefit and that of her children,*" — the part in Italics being additional to that of Massachusetts.

¹ Clark v. Durand, 12 Wis. 223.

² Archibald v. Mut. Life Ins. Co., 38 Wis. 542.

³ Foster v. Gile, 50 Wis. 603. See also Gambs v. Covenant Ins. Co., 50 Mo. 44; Landrum v. Knowles, 22 N. J. (Eq.) 594; Pullis v. Robinson (Mo.), 12 Repr. 144.

⁴ Ante, § 390.

⁵ Ricker v. Charter Oak Ins. Co. (Minn.), 10 Ins. L. J. 143; Gosling v. Coldwell (Tenn.), Wis. Leg. News, Feb. 17, 1879; Trager v. Louisiana, &c. Ins. Co., 9 Ins. L. J. 817; Goodrich v. Treat (Col.), 7 Ins. L. J. 269.

⁶ Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398.

appear that the amount of annual premiums exceeds the sum permitted by the statute, as in that case the policy is not within the statute.¹ In *Baker v. Young*² there was no objection on account of excessive payment of premiums, and the court held that such a policy was assignable under the statute.³ They thought that the clause providing that the policy should inure to the benefit of the wife and children referred simply to the manner of the descent and distribution, to wit, that after the wife has received and reduced the money to possession and dies, it shall go to the children and not to the husband's representatives,—an interpretation made the more apparent by the concluding paragraph of the section providing for the appointment

¹ *Charter Oak Life Ins. Co. v. Brant*, 47 Mo. 419. If in such case the husband, being solvent when the policy issues, and afterwards becoming insolvent, continues to pay the premiums, the proceeds will go to the widow and creditors in proportion to the premiums paid while solvent and insolvent. *Pullis v. Robinson* (Mo.), 12 Repr. 144. It seems that the restriction in the statute does not apply to solvent persons. *Ibid.* See also *Pence v. Makepeace*, 65 Ind. 347. As to the distribution of the funds when the husband is insolvent the cases do not agree, and it is difficult to extract any rule from them. In Mississippi, where a debtor in insolvent circumstances voluntarily assigned a life policy payable to himself, to his wife and children, the assignment was held to be void as against then existing creditors. *Catchings v. Manlove*, 39 Miss. 655. But the title to a policy payable to the wife is in her, though the assignee of a bankrupt might recover from her the amount of payments of the insolvent husband. *In re Bear*, 11 Nat. Bankr. Reg. 46. But in another case in a United States court it was held that where premiums have been paid by an insolvent husband, the additional value created by the premiums during insolvency will belong to the estate in bankruptcy. *In re Yaeger*, Dist. Ct. (Mo.), 5 Ins. L. J. 238. In Illinois, the assignment of a policy on his own life by an insolvent husband to his wife, is good against the creditors except as to so much as has been paid for premiums within the time limited by the statute. *Cole v. Marple* (Ill.), 23 Alb. L. J. 98. In Missouri a still different rule prevails, namely, that the money shall be apportioned so that the widow shall have so much of the fund as was produced by the payment of the premiums by her husband while solvent, and the creditors so much as was produced by the payment of premiums while insolvent. *Pullis v. Robinson*, 12 Repr. 144. And where there is no statute to control, the courts, in the interest of a prudent and commendable provision for his family, have gone a great way towards the protection of the families of insolvent husbands as against their creditors. *Goodrich v. Treat* (Col.), 7 Ins. L. J. 269; *Stokes v. Coffey*, 8 Bush (Ky.), 533; *Succession of Hearing*, 26 La. An. 326; *Winchester v. Stebbins*, 16 Gray (Mass.), 52.

² 47 Mo. 453.

³ The statute differs in no material respect from that of Massachusetts.

of a trustee to manage the interests of the married woman in the policy and its proceeds, while nothing is said concerning the interests of the children. The object of the statute was to protect the wife, but not to restrain her, and to leave it open to her choice to make a voluntary disposition of it; and, if she was mentioned in the policy as the beneficiary, but not otherwise, she might assign it as a security for, or in discharge of, the debt of her husband.¹

The assignment and assent forms a new and derivative contract with the assignee; but the original contract, nevertheless, remains for the protection of the original insured, and also for the protection of the insurers, and both contracts fail if the first fails, since the last is derived from and dependent on the first.² In Tennessee,³ the statute provides that any husband may effect a life insurance on his own life, and the same shall in all cases inure to the benefit of his widow and heirs. But the court held that an ordinary policy, not by its terms made payable to the widow and heirs, was not within the meaning of the statute; and that as the insured, who had a policy on his life for seven years, had during its currency and while he lived the right to dispose of his own as he pleased, an assignment for the security of a creditor was valid. The statute of Tennessee, it is to be observed, provided that the insurance should inure to the benefit of the widow and heirs, and not be subject to the husband's debts, but did not add, as is substantially the case in the statutes of most of the other States, "independently of the claims of the husband or of any other person effecting the policy." And the court intimated that, if the policy had been made payable to the widow and heirs, the proceeds could not have been diverted from that disposition.⁴ A policy on the life of the husband for the benefit of the wife does not go to a bank-

¹ Conn. Mut. Ins. Co. v. Ryan (St. Louis Ct. of App.), 10 Ins. L. J. 72.

² Baker v. Young, *supra*. See also Wilson v. Hill, 3 Met. (Mass.) 66; Carpenter v. Prov. Wash. Ins. Co., 16 Pet. (U. S.) 495; Cummings v. Cheshire Ins. Co., 55 N. H. 457.

³ Rison v. Wilkerson, 3 Sneed, 565.

⁴ See also Williams v. Corson (Tenn.), 5 Big. Life & Acc. Ins. Cas. 524; Gould v. Emerson, 99 Mass. 154.

rupt's creditors, but is the property of the wife, and is not assignable by the husband, at law or in equity.¹ [Where the life of S. is insured in favor of A., B., C., who pay the premiums, S. cannot by assignment give any right under the policy, the contract is not with him.² But a life-subject to whom the policy is payable if he survives a certain day has an assignable interest in the policy.³]

[§ 391 A. **Husband and Wife.**— A parol assignment of a policy by a husband to his wife, with delivery creates an equitable right, and is good against creditors unless intended to defraud them.⁴ A husband's handing a non-transferable accident ticket to his wife, saying she should "take care of it, and if he got killed before he got back she would be \$3,000 better off," does not constitute a gift as against the husband's creditors.⁵ In Nova Scotia an assignment by a man directly to his wife is invalid.⁶ If to secure the husband's debts a wife joins in assigning a policy taken out by her husband on his life for her benefit, she at most becomes merely a surety, and an extension of time without her consent discharges her.⁷ The wife may indorse her name in blank on the policy to enable her husband to use it as collateral security for a loan, and equity will hold the assignment valid in favor of the person making the loan, but if the husband not only fills up the assignment for a loan as contemplated by his wife but also for a pre-existing debt, the wife is not bound as to the latter.⁸ In New York a wife may now by statute assign her interest in a policy for her benefit on her husband's life with his written consent;⁹ but before the passage of these laws such

¹ *In re Bear*, 11 Nat. Bankr. Reg. 46; *Galloway v. Craig*, 23 C. C. S. 12, reversing s. c. 22 id. 1211; *Parkes v. Bott*, 8 L. J. n. s. Ch. 14.

² [*Ferdon v. Canfield*, 104 N. Y. 143.]

³ [*Pierce v. Charter Oak Ins. Co.*, 138 Mass. 151.]

⁴ [*Chapman v. McIlwraith*, 77 Mo. 38.]

⁵ [*Williams' Appl.* 106 Pa. St. 116, 119.]

⁶ [*Bliss v. Aetna Life Ins. Co.*, 19 N. S. R. 363.]

⁷ [*Allis v. Ware*, 28 Minn. 166.]

⁸ [*Conn. Mut. Life Ins. Co. v. Westervelt*, 52 Conn. 586.]

⁹ [Laws of 1873, ch. 821; Laws of 1879, ch. 248. See *Anderson v. Goldsmidt*, 103 N. Y. 617.]

an assignment was voidable at her option.¹ Where the wife to whom a policy on her husband's life was payable, was by fraud and coercion induced to assign it as collateral to B., a subsequent creditor of her husband, who did not know of the fraud and coercion and who paid premiums on the policy, it was held that B. was not an innocent purchaser for value, and as against the wife was only entitled to his premiums.^{2]}

[§ 391 B. **Creditors.** — If the insurance company does not object to an assignment of the policy, a creditor of the insured cannot. The provision is only for the benefit of the insurer.³ In Maryland under the Act of 1878, ch. 200, a father may make a voluntary assignment of a life policy to his wife or children or both, free and clear of his creditors.⁴ An assignment of a policy to a debtor, the surplus after liquidating his debt to be used as a trust fund for C., is void as to creditors at the time, who continued to be so up to his death.⁵ If a trustee assigns a policy to a creditor and afterwards assigns his trust to a third person without mentioning in his specific detail of matters assigned this policy, it has been held that the second trustee has no right to the policy as against the creditor.⁶ When one who is insolvent at the time of insurance assigns the policy in trust for his wife, the transfer is fraudulent and void as to creditors.⁷ But the mere existence of debts is not enough, the actual fact of insolvency must be shown.⁸ A mutual policy in a company whose constitution provides for the changing of the beneficiary, who may be any "legatee or devisee," may be assigned to a creditor to cover his debt.⁹ If a wife indorses her name in blank on a policy,

¹ [Frank v. Mut. Life Ins. Co., 102 N. Y. 266. See further on this subject under the laws of N. Y., *Living v. Domett*, 26 Hun, 150; *Leonard v. Clinton*, id. 288, 290; *Bloomington v. Lisberger*, 24 Hun, 355; *Smillie v. Quinn*, 25 Hun, 332.]

² [McCutcheon's Appl., 99 Pa. St. 133.]

³ [Leinkauf v. Calman, 110 N. Y. 50.]

⁴ [Earnshaw v. Stewart, 64 Md. 513.]

⁵ [*In re Magawley's Trust*, 5 De G. & S. 1.]

⁶ [Johnson v. Swire, 3 Giff. 194.]

⁷ [Appeal of Elliott's Ex'rs, 50 Pa. St. 75.]

⁸ [Skarf v. Soulby, 1 Mac. & Gor. 364.]

⁹ [Martin v. Stubbings, 126 Ill. 387.]

and the husband fills it out and gets a loan on it with which he pays part of the premium, and the remainder not being paid in time the policy is declared void, and a new one issued to the wife, applying the sum paid on the old premium to the new one, the creditor has a lien on the insurance money.¹ An assignment of a life policy is not affected by a prior general assignment in favor of creditors, where it appears that the policy remained in the hands of the assignor, and never came to the possession of nor was ever claimed by the assignee for creditors.²]

§ 392. **Life Policy ; Devise of Proceeds ; Rights of Children.**

— So where the policy was for the sole benefit of children, it was held that the father could not devise the proceeds to his executors in trust for other purposes.³ The children in such case became vested immediately upon the delivery of the policy with the entire beneficial interest, and it is then beyond the control of the insured. So where the policy is issued to the wife, payable to her, or, in case of her death before her husband, to her children. The husband cannot, after her death, surrender the policy and take out a new one for his own benefit.⁴ So if at the suggestion of the wife, who pays all the subsequent premiums, her husband applies for and takes out a policy on his life for her benefit, herself paying the first premium, the policy acknowledging the receipt of the several premiums as from the wife, this is an insurance by the wife, the husband acting as agent, and the creditors of the husband have no claim to the proceeds.⁵ All the above-

¹ [Norwood v. Guerdon, 60 Ill. 253.]

² [Hurlbut v. Hurlbut, 49 Hun, 189.]

³ Ruppert v. Union Mut. Ins. Co., 7 Robt. (N. Y. Superior Ct.) 155. The charter provided that policies might be issued for the benefit of a minor, and should inure to his benefit independently of the one whose life may be thus insured. If the statute authorizes a devise to wife or children, in the absence of both, the proceeds go to the estate of the insured. Hathaway v. Sherman, 61 Me. 466.

⁴ Chapin v. Fellowes, 36 Com. 132; Fraternal Mut. Life Ins. Co. v. Applegate, 7 Ohio St. 292; Gould v. Emerson, 99 Mass. 154; Bailey v. New England, &c. Ins. Co., 114 Mass. 177; Succession of Kugler, 23 La. An. 455.

⁵ Jacob v. Continental Ins. Co., Superior Ct., Cleveland (Ohio), 2 Big. Life & Acc. Ins. Cas. 155. See also *ante*, § 390.

cited cases proceed upon the ground that when the policy is issued the rights are vested, and cannot be divested without the consent of those to whom they are secured.

§ 393. **Right to sue and Right to appropriate Proceeds not identical.**—The right to sue under a policy of insurance, whether in the party who insures, or the representatives of the life insured, or the beneficiary, is variously maintained in the different States, according to the provisions of their several statutes, and the greater or less strictness of adherence, by the several courts, to the rules of the common law.¹ The general rule is that the action must be brought in the name of the person or his legal representative to whom the insurance is made.

The right to sue, however, under these statutes, enacted in the interest of the family support, is not to be confounded with the right to appropriate and use the proceeds. The assignee may well have the right to sue in his own name and recover the amount payable by the policy, but he recovers to hold in trust for the beneficiaries. "The rights of the child," say the court, in *Burroughs v. State Mutual Life Insurance Company*,² "cannot be set up to defeat this action. No trustee has ever been appointed to hold and manage the interest of the wife. The policies are in terms payable to the assured and his assigns. The assignment to the plaintiff, assented to by the insurers, transferred to him the legal title in the policies, and the right to sue thereon. If the assured had afterwards died, leaving no wife or child surviving, the assign-

¹ [An action at common law on an assigned policy must be brought in the name of the assignor. *Hobbs v. Memphis Ins. Co.*, 1 Sneed (Tenn.), 444 at 452. The assignee cannot maintain an action thereon in his own name: *Bayles v. Insurance Co.*, 27 N. J. L. 163 at 165, except by statute permission. *Gourdon v. Ins. Co. of N. A.*, 3 Yeates, 327 at 334. In Texas a policy may be assigned under articles 266 and 267 of the Rev. Stats. so as to give the assignee a right of action in his own name, but subject to all claims against the previous owner arising before notice of the assignment to the defendant. *East Tex. Fire Ins. Co. v. Coffee*, 61 Tex. 287. This embodies the rule that obtains in equity. In Missouri, a legal assignee of the policy showing that he is the equitable owner of the interest of the assured in the premises may recover. *Breckinridge v. Amer. Cent. Ins. Co.*, 87 Mo. 62.]

² 97 Mass. 359.

ment would have entitled the assignee to receive the whole amount of the policies to his own use. The plaintiff, having the legal title, may maintain this action at law, and, if he recovers judgment, will hold the proceeds, so far as they inure to the benefit of the child of the assured, in trust for him. The equitable rights of the child under the statute, and the extent to which they may be subject to a claim of the assignee for reimbursement of the sums paid by him for premiums and assessments, or otherwise cannot now be determined, but may be ascertained upon a bill of interpleader filed by the insurance company, or in a suit by the child against this plaintiff after he shall have recovered judgment in this action.”¹

§ 394. If a husband insures his life for the benefit of his wife, without her authority, the policy being made payable to her, her subsequent acceptance of the policy is such a ratification of the act of her husband as to bring her within the statute which authorizes a wife to cause her husband's life to be insured, and to constitute a valid contract between her and the insurance company.²

§ 395. **Assignment, What constitutes ; Possession ; Delivery.**—A mere declaration contained in a letter, that a life insurance was made for the person addressed, without a delivery of the policy, is no assignment.³ Possession of the policy is only *prima facie* evidence of a right to claim the proceeds, and is open to the objection that delivery was unauthorized, that there is an assignment outstanding in the hands of another, or to any other evidence explanatory of the possession and showing its purpose.⁴

Mere possession, however, is evidence of title in the policy and the right to its proceeds. In the absence of a formal transfer in writing, which is not necessary, there are many

¹ The general subject of the right to sue, and who may claim the loss, will be considered hereafter, when we come to treat of the loss and its incidents, *post*, § 445 *et seq.*

² *Thompson v. Am. Fire, Life, & Sav. Ins. Co.*, 46 N. Y. 675.

³ In the matter of *Webb*, 49 Cal. 541.

⁴ *Wood v. Phoenix Mut. Life Ins. Co. of Hartford*, 22 La. An. 617 ; *Pence v. Makepeace*, 65 Ind. 347.

other facts and circumstances which courts will recognize as equivalent to an assignment. Delivery is not essential.

While delivery of the instrument of assignment seems to be necessary as against the assignee in bankruptcy,¹ or at least a delivery and deposit of the policy before the bankruptcy, for that purpose, with notice to the company, which may be after the act of bankruptcy if before the adjudication, and if the depositary is not aware of the act of bankruptcy,² it does not seem to be necessary in a case where a person insures his life and assigns his policy, and the assignee gives notice to the insurers and subsequently pays all the premiums. In one case, though the assignee had negligently permitted the policy to remain in the hands of the assignor, it was held he was entitled to it, in the absence of any fraudulent purpose on his part, even against one who had innocently advanced money to the assignor after the assignment.³ So a letter written by the insured, giving notice of a wish to transfer his interest to a third person, the letter being shown to the company and its contents noted on their books, was held to be a good assignment in equity against a subsequent assignee who had got possession of the policies.⁴ Reputed ownership, and the fact that the policy is left within "the order and disposition" of the bankrupt, seem to require something more to perfect an assignment of a policy as against an assignee in bankruptcy than as against an ordinary assignee.⁵ But a mere direction from the solicitor of the assignee, though entered by the company on its books, to send letters touching the policy to that solicitor, is no notice to take the policy out of the order and disposition of the bankrupt as against his assignee.⁶ Yet where it was provided

¹ *Palmer v. Merrill*, 6 Cush. (Mass.) 282; *ante*, § 389.

² *In re Styan*, 1 Phillips, Ch. 105.

³ *Neale v. Molineux*, 2 C. & K. 672. If negligence instead of fraud had been pleaded, the result might have been different. See *Dearle v. Hall*, 8 Russ. Ch. 1.

⁴ *Chowne et al. v. Baylis*, 31 Beav. 351.

⁵ See *Green v. Ingham*, L. R. 2 C. P. 525; s. c. 5 Big. Life & Acc. Ins. Cas. 662; *Alletson v. Chichester*, L. R. 10 C. P. 319; s. c. 5 Big. Life & Acc. Ins. Cas. 688.

⁶ *West v. Reid*, 2 Hare, Ch. 249.

that if the policy should be assigned *bona fide*, the assignee should have the benefit of it so far as his interest extended, although the insured should commit suicide, it was held that a deposit of the policy as security for a debt, accompanied by a letter promising to assign it upon request, though there was no notice to the insurers, was a *bona fide* assignment within the meaning of the policy.¹ Indeed, in such case, a mere deposit gives the depositary a "*bona fide* interest" in the policy "as a security for money."² So a deposit with a letter authorizing the depositary to hold as security for any indebtedness that may exist between the insured and the assignee, is an "assignment" which a court of equity will recognize and enforce.³ So when the policy, if "legally assigned," is to be good to the assignee, a deposit as security for any balance of accounts which may be found due as between the assured and the assignee is good. As in strictness a policy cannot be legally assigned, the words here must be taken in the popular sense as equivalent to "lawfully," that is, effectually and properly assigned, so that the courts can recognize and enforce the act.⁴ A life policy may also be the subject of a *donatio mortis causa*.⁵

Delivery by placing the policy in the safe of a firm, of which the assignor is a member, or of any third person in trust for the beneficiary, is sufficient.⁶ And the retention of possession by the assignor, a husband, in behalf of the assignee, a wife, by agreement, after a *bona fide* equitable assignment by delivery, will be regarded as the possession of the assignor.⁷ So is handing it to the agent of the insurers, with a request to keep it for the designated assignor, a good delivery.⁸ A policy payable, a given sum on suffering per-

¹ Cook v. Black, 1 Hare, Ch. 390.

² Moore v. Woolsey, 4 E. & B. 243.

³ Jones v. Consolidated Ins. Co., 26 Beav. 256.

⁴ Dufaur v. Prov. Life Ass. Co., 25 Beav. 599, 603.

⁵ Witt v. Amis, 1 B. & S. (Q. B.) 109.

⁶ Estate of Trough, 8 Phila. 214; Lemon v. Phoenix, &c. Ins. Co., 38 Conn. 294.

⁷ Estate of Malone (Pa.), 9 Ins. L. J. 767; Fowler v. Butterly (N. Y.), 9 Ins. L. J. 329.

⁸ Marcus v. St. Louis, &c. Ins. Co., 68 N. Y. 625, overruling s. c. 7 Hun (N. Y.), 5.

sonal injury, and a certain other sum at the death of insured, will be equitably assigned to the wife, as to the last sum, if the husband in writing requests her to take the policy, and "keep it up," saying that it shall be hers if she does so keep it up by paying the dues.¹ And whether the delivery is with intention to give the assignor full power and control is for the jury to determine, on all the circumstances.² In Scotland, it seems that the delivery of the policy, coupled with a promise to assign, is no assignment.³

§ 396. **Notice of Assignment, Life.** — Notice of the assignment is not necessary to its validity as between the assignees and the insurers, unless required by the terms of the policy; and a notice at the bottom of the policy that, "if assigned, notice must be given to the company," does not affect the case as between the insurers and the assignee, whatever might be its effect as between him and his creditor. In this respect, assignments of life policies bear a more near analogy to marine than to fire policies. When the contract is to pay to personal representatives or assigns, the right of the assignee becomes perfect by force of the assignment alone, and by the transfer he becomes instantly invested with the legal interest in the policy, of which by the same act the assignor becomes divested. The insurer does not need notice for his protection. He cannot be required to pay unless the policy is produced, or its non-production satisfactorily accounted for; nor can he be required to pay without proof that the person demanding payment is by law the rightful assignee of the policy, and entitled to recover the money. He is sufficiently protected against all risks, except such as may arise from his own carelessness, against which the law gives him no protection.⁴ But for his own protection, where it is not required, it may be prudent for the assignee to give notice, in order to avoid the

¹ *Swift v. Railway, &c Ins. Co.*, 96 Ill. 309.

² *Marcus v. St. Louis, &c. Ins. Co.*, 68 N. Y. 625; *Pence v. Makepeace*, 65 Ind. 347.

³ *United Kingdom Ins. Co. v. Dixon*, 16 Ct. of Sess. Cas., 1st Series, 1277; s. c. 3 Big. Life & Acc. Ins. Cas. 424.

⁴ *Mut. Prot. Ins. Co. v. Hamilton*, 5 Sneed (Tenn.), 269.

claims of subsequent assignees, as also claims for set-off for advances to the assignor before notice.¹ When notice is required, notice after death is sufficient, and probably at any time before payment to the representatives of the assignee.² Still, in many cases, notice of the assignment is required, and the assent of the company thereto, as a guard against the dangers of speculative, not to say gambling, insurance. When these are required, on penalty of forfeiture, the assignment is ineffectual without them as against the insurers.³ And so it was held in *Stevens v. Warren*,⁴ which was a case where the assured in his lifetime assigned his policy to one who had no insurable interest in the life of the assured, without the assent of the insurers, which by the terms of the policy was requisite. It is easy to see that unless this check were provided, a dangerous species of gambling and speculation might be encouraged. Verbal notice will be sufficient, unless it be required to be in writing,⁵ and to an agent,⁶ unless he be a trustee, or in some way interested.⁷ No form of words is necessary. Any expression in words appropriate to convey the fact, and used for that purpose, will amount to notice. It is enough for the assignee to say that he is the holder.⁸ But the words should be used under such circumstances as to naturally call the attention of the insurers to the fact that notice is intended. A mere incidental mention, therefore, to a clerk, by the agent of the holder, who had been sent to inquire if the premiums had been paid, might not be enough;⁹ and information acquired in casual conversation, such as would not be ordinarily treated as having any special purpose, would not be

¹ Succession of Risley, 11 Rob. (La.) 298; *Stocks v. Dobson*, 4 De G., M. & G. 11; *In re Russell's Policy Trusts*, L. R. 15 Eq. 26.

² *New York Life Ins. Co. v. Flack*, 3 Md. 341.

³ The policy does not, however, become void by such an assignment, unless such is the agreed result. *Marcus v. St. Louis, &c. Ins. Co.*, 68 N. Y. 625.

⁴ 101 Mass. 565.

⁵ *North Brit. Ins. Co. v. Hallett*, 7 Jur. n. s. 1263; *Gale v. Lewis*, 9 Q. B. 730.

⁶ *Ibid.* See also *ante*, § 367.

⁷ *Browne v. Savage*, 4 Drew. 635.

⁸ *Ex parte Stright*, 2 Dea. & Chit. 314.

⁹ *Edwards v. Scott*, 2 Scott (N. H.), 266.

notice,¹ at least, as against the claim of a subsequent assignee.²

§ 397. **Assignment ; Fraud.** — If the assignment be procured by undue influence, which amounts to moral duress, as by exciting the fears of a wife by threats that her husband shall be incarcerated if she does not make the assignment,³ of course it is void, as is also the case if it be procured by fraud ;⁴ as where, upon private information of the dangerous sickness of the insured, the policy is purchased of the assignee of the insured at what it would be worth if there was no such sickness, the assignee being in ignorance of the fact ;⁵ and so where possession is obtained of a policy payable to a third person, by false pretences on the part of the person who effected the insurance, which upon his request is cancelled, and thereupon another policy is issued, payable to a different person from the payee in the cancelled policy.⁶ This case was a bill in equity by the payee of the first policy against the company and the payee of the second policy (who, however, did not appear, though notified of the suit), to compel the payment of the proceeds of the second to her. And an assent to an assignment procured by misstatement will vitiate the assent.⁷

§ 398. **Assignment of Life Policy to a Party without Interest void.** — All the objections that exist against issuing a policy to one upon the life of another, in whose life the former has no insurable interest, exist against his holding such policy by mere purchase and assignment from another. In either case, the holder of such policy is interested in the death, rather than

¹ *Edwards v. Martin*, 1 L. R. Eq. 121.

² *North Brit. Ins. Co. v. Hallett*, 7 Jur. N. S. 1263.

³ *Eadie v. Slimmon*, 26 N. Y. 9.

⁴ *Ante*, § 385.

⁵ *Jones et al. v. Keene*, 2 Mood. & Rob. 348 and note.

⁶ *Lemon v. Phoenix Mut. Life Ins. Co.*, 38 Conn. 294. In such case the original insured may recover of the party procuring the cancellation the full amount of the cancelled policy, less the premium paid by him on the first. *Gray v. Murray*, 3 Johns. (N. Y.) 167. And see *ante*, § 385 ; *Tabor v. Michigan, &c. Ins. Co.*, 10 Ins. L. J. 97.

⁷ *Johnstone v. Niagara, &c. Ins. Co.*, 13 U. C. (C. P.) 331 ; *Merrill v. Farmers' Ins. Co.*, 48 Me. 285.

in the life, of the insured.¹ The policy of the law forbids such speculations based on the continuance of human life. It will not uphold a practice which incites danger to life, and it substantially declares that no one shall have any claim under a policy upon the life of another, in whose life he had no insurable interest at the time he acquired the policy, whether the policy be issued to him directly from the insurer, or whether he acquires the policy by purchase and assignment from another. If he may purchase a policy on the life of another in whose life he has no interest, as a mere speculation, the door is open to the same practice of gambling, and the same temptation is held out to the purchaser of the policy to bring about the event insured against, as if the policy had

¹ [An assignee of a life policy is entitled to the proceeds only to the extent of his insurable interest. *Roller v. Moore's Admr.*, 19 Ins. L. J. 39 (Va.), Nov. 1889. A life policy cannot be assigned during the "life" to one without insurable interest in it. Such an assignment is open to all the objections that exist against an original insurance by such person of a life in the continuance of which he is not interested. *Ala. Gold Life Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ala. 329; *Bayse v. Adams*, 81 Ky. 368, 375. The assignee must have such ties of blood, or marriage, or business relations with the insured as will justify a reasonable expectation of advantage or benefit from the continuance of his life. And if an assignee without insurable interest receives the insurance money from the company, the administrator of the insured or the beneficiaries may recover the funds from the assignee. *Warnock v. Davis*, 104 U. S. 775, 779, citing *Cammack v. Lewis*, 15 Wall. 643; *Price v. Knights of Honor*, 68 Tex. 361; *Sternes v. Warner*, 101 Mass. 364, cited; *Ruth v. Katterman*, 112 Pa. St. 257; *Downey v. Hoffer*, 110 Pa. St. 109. The same is true in case of a policy made in favor of one not a near relative nor a creditor. *Roller v. Moore's Adm.*, 19 Ins. L. J. 39, 41 (Va.), Nov., 1889; *Armstrong v. Mut. Life Ins. Co.*, 20 Blatch. 493; 11 Fed. Rep. 573; 11 Ins. L. J. 441. In this case the assignee murdered the assured, — a strong illustration of the force that lurks in the objection made by the law to such assignments. It is against the policy of the law for one who has no interest in the life of another to take out a policy on that life, and the same reason will prevent a beneficiary during the continuance of the life from selling or transferring the policy to one without interest in the "life." Such a transaction is void, and although, after death of the insured, the assignee return the policy to the beneficiary with the word "cancelled" written across the assignment, the policy is dead in the hands of the beneficiary or his assignee. *Life Ins. Co. v. McCrum*, 36 Kans. 146. If an assignment by the beneficiary is void, still the representatives of the "life" have no claim on the funds and cannot sue the assignee for them. They belong to the beneficiary. *Hoffman v. Hoke*, 122 Pa. St. 377. The burden is on the administrator to show that the assignee who has received the insurance and from whom he claims it was not a near relative nor a creditor. *Lenig v. Eisenhart*, 127 Pa. St. 59.]

been issued directly. It is, in fact, an attempt to do indirectly what the law will not permit to be done directly.¹ If the interest be merely nominal, as when a policy for \$3,000 is taken out, and assigned to secure a debt for \$70, with an agreement to pay the wife of the insured a portion of the proceeds, and the assignee receives the proceeds of the policy, the administrator may recover the whole, less the debt and premiums paid for the assignor.² [An assignment of a life policy as security for advances made and to be made by the assignee is good to the extent of the advances.³]

[§ 398 A. If the company waives the want of insurable interest in an assignee, an assignor or prior assignee cannot claim any advantage from the want of such interest.⁴ Indeed, the doctrine that the assignment of a policy to one without interest in the life is as objectionable as the taking out of a policy without insurable interest, does not seem good sense. If this is so, it is difficult to understand how the designation

¹ *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, citing and approving *Stevens v. Warren*, 101 Mass. 554, *ante*, § 110, and doubting *St. John v. Am. Mut. Life Ins. Co.*, 13 N. Y. 31; *Valton v. Nat. Loan Fund Life Ass. Co.*, 20 N. Y. 32; and *Ashley v. Ashley*, 3 Sim. 149, apparently to the contrary. In this case, the insured sold his policy to one who was not his creditor, and who had no insurable interest, and the company assented to the sale and assignment. See also *Franklin Ins. Co. v. Sefton*, 53 Ind. 380, affirming *Hazzard's* case, and explaining *Hutson v. Merrifield*, 51 Ind. 24; *Guardian, &c. Ins. Co. v. Hogan*, 80 Ill. 35; *Missouri, &c. Ins. Co. v. Sturges*, 18 Kans. 93; *Ferguson v. Massachusetts, &c. Ins. Co.*, Sup. Ct. (N. Y.), 11 Repr. 752; *Varina v. N. Y. Life Ins. Co. (Q. B. Montreal)*, 3 Leg. News, 322; *Swick v. Home Ins. Co.*, 2 Dill. C. Ct. 166; *Lewis v. Phoenix Ins. Co.*, 39 Conn. 100; *Singleton v. St. Louis, &c. Ins. Co.*, 66 Mo. 63; *Mutual Benevolent Ass. v. Hoyt (Mich.)*, 10 Ins. L. J. 627. *Contra*, *Clark v. Allen*, 11 R. I. 439. But the court will not look narrowly at the transaction to find grounds for setting it aside. If, for instance, the insured assigns all his interest in a policy absolutely to a creditor, the court will, if possible, uphold the transaction as a permissible one, by way of security, with a trusteeship in the assignee for any balance in favor of the assignor, rather than as an illegal one, giving to the assignee an interest in the death of the assignor. *Page v. Bornstine*, Sup. Ct. (U. S.) Wash. L. R. March 2, 1881. See also *Cunningham v. Smith*, 70 Pa. St. 450, which upholds an absolute assignment to a person interested contingently as to the amount. *Provident Life Ins. Co. v. Baum*, 29 Ind. 236.

² *Cammack v. Lewis*, 15 Wall. (U. S.) 643.

³ [*Gilman v. Curtis*, 66 Cal. 116.]

⁴ [*Conn. Mut. Life Ins. Co. v. Fisher*, 30 Fed. Rep. 662 (Mo.), 1887.]

of a beneficiary outside of those having an insurable interest in the life, can be upheld. There seems to be a clear distinction between cases in which the policy is procured by the insured *bona fide* of his own motion, and cases in which it is procured by another. It is a very different thing to allow a man to create voluntarily an interest in his termination, and to allow some one else to do so at their will. The true line is the activity and responsibility of the assured, and not the interest of the person entitled to the funds. It is well established that a man may take out a policy on his own life, payable to any person he pleases; and it is drawing a distinction without a difference to hold that he cannot take out a policy and *afterward* transfer its benefits. An assignment by the beneficiary, or by an assignee, unless with the consent of the "life," is, however, a very different matter, and involves what seems to be the real evil that the law is blunderingly seeking to exclude, viz., the obtaining *by B.* of insurance on the life of A., in contradistinction to its obtainment by A. for B.'s benefit. Authority is not lacking. In Ohio it is held that in the absence of statutory provision, or stipulation to the contrary, one may assign a policy he has taken out on his own life to whomsoever he will. The assignee or donee need not have an insurable interest in his life.¹ A policy issued to a *bona fide* beneficiary may be assigned to one having no interest in the life, and a by-law providing that no policy shall issue unless the beneficiary has an insurable interest, is not violated by such assignment.² An assignment of a life policy to a creditor in consideration of a discharge of the debt and payment of a sum of money by him is good. True, he has no interest in the life insured, and could not make a contract of insurance on that life directly with the insurers, but the policy is supported by the interest of the assignor, and is in form payable to her. If the assignment is good between the parties, it is payable to her in trust for the assignee; if void, for her own use. The assignment passed the equitable interest in the

¹ [Eckel v. Renner, 41 Ohio St. 232; Bursinger v. Bank of Watertown, 67 Wis. 75.]

² [McFarland v. Creath, 35 Mo. App. 112.]

policy.¹ A life policy is assignable, like any other *chose in action* when the transaction is not a mere cover for a wager contract.²]

§ 399. **Assignment of Part without Assent invalid.** — So also an assignment of part of the proceeds of a policy, as, for instance, by the insured, a debtor, to secure his creditor, carries with it no obligation on the part of the insurer to pay the assignee that part unless the insurer expressly assent, — upon the familiar principle that a debtor cannot be presumed to consent that what he has agreed to pay *in solido* and at once to one person, he may be obliged to pay in parts to different individuals. He will not be presumed to give several parties several rights of action against him when only one right existed, unless he plainly assent thereto. Mere notice will not do. And at law the creditor cannot recover in an action against the administrator of the insured.³ In a cause in equity, however, in Illinois, where the policy was payable to the wife, and she had assigned a part of it to secure a debt of her husband, and after his death refused to recognize the assignment, and claimed the whole amount, — on a bill of interpleader, filed by the insurers, it was held that the assignment must be enforced in favor of the creditor, and the balance of the proceeds paid to the widow.⁴

[§ 399 A. A policy payable to the assured *or his assigns*, at a future day named, or to his representatives if he should die before that, is assignable, and carries to the assignee the right to the sum payable in case of death before the day named.⁵ If the assignee causes the death of the life-subject by felonious means his recovery on the policy is defeated.⁶ I presume the word “felonious” is very necessary, for he might worry the life out of the insured or use other unfelonious means of extermination and still recover. An assignment of a policy to a

¹ [Mutual Life Ins. Co. v. Allen, 138 Mass. 24, 27, 29.]

² [Fitzpatrick v. Hartford Life & Ann. Ins. Co., 56 Conn. 116; Bushnell v. Bushnell, 92 Ind. 503, 602.]

³ Palmer v. Merrill, 6 Cush. (Mass.) 282.

⁴ Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398.

⁵ [N. Y. Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591.]

⁶ [Ibid.]

mortgagee carries the whole interest if needed to reach the amount of the mortgage.¹ Where one covenanted to settle after-acquired property, on part of which there was a policy conditioned against assignment, the settler was held to be a trustee as to the policy. It was non-assignable at law, but he could deal with the beneficial interest in it according to his covenant.² When a policy is assigned as collateral security the assured must pay the premiums.³

[§ 399 B. When a bankrupt assigned a policy to A, but the company, considering it invalid, paid the bankrupt one half the insurance as a gratuity, and the policy was cancelled, it was held, in an action by the assignee of the bankrupt against A for trover, that the value of the policy only and not the gratuity could be recovered.⁴ If A agrees to assign a life policy to B., he must assign it free from all incumbrances except the annual premiums.⁵ When a person assigns a policy, agreeing to pay the premiums, and that if he does not the assignees may pay them and add them to the mortgage debt, no action can be brought to recover such premiums from the assignor, for the agreement is that they are to be added to the mortgage debt.⁶ The real injury sustained, not the amount of the premiums, is the measure of damages.⁷ The assignor of a policy that was conditioned against going out of Europe, covenanted not to do anything to avoid the policy. He did violate the said condition, however, and the measure of damages on the covenant was held to be the present value of the policy plus the premiums which the defendant was to pay, but which, on his failure, had been paid by the assignee.⁸ The measure of damages for breach of agreement to assign a policy to the vendee of the subject-matter, whereby the policy becomes void, is not the injury to the house by the fire, but the cost of pro-

¹ [Mund v. Insurance Co., 15 Phil. 291.]

² [In re Turcan, 40 Ch. D. 5.]

³ [Grant v. Ala. Gold Life Ins. Co., 76 Ga. 575.]

⁴ [Wills v. Wells, 8 Taunt. 264 at 267.]

⁵ [Gatayes v. Flather, 34 Beav. 387.]

⁶ [Browne v. Price, 4 C. B. N. s. 598 at 613.]

⁷ [National Ass., &c. v. Best, 2 H. & N. 605 at 615.]

⁸ [Hawkins v. Coulthurst, 2 B. & S. 343.]

curing insurance for the unexpired term. The plaintiff cannot hold the vendor as insurer; his agreement was to assign the policy, not to insure himself, and the damage is the value of the thing he agreed to transfer and did not. The plaintiff upon breach of the contract should procure other insurance. She cannot elect to remain uninsured and hold the vendor as a policy maker.¹ If the company sets up an assignment and payment to the assignee, the burden is on the assured to resist this *prima facie* defence by evidence that the assignment was fraudulently obtained, and that before payment the company had notice, and a letter from a *stranger* to the company is not sufficient.² The heir-at-law of a member may raise the point that an assignment by the member is invalid because not approved by the secretary.³

[§ 399 C. *Bequest, &c.* — Where policies are held by a wife on her husband's life, she surviving him, and willing, after some special bequests, all the residue of her property of whatever kind *which she owned or was possessed of prior to the death of her husband*, to four persons named, the policies pass to these persons under this clause.⁴ The bequest of the testator of "any money that he might die possessed of, or which might be due and owing to him at the time of his decease," include moneys receivable under a policy of insurance on his own life.⁵ A policy may pass as a *donatio mortis causa*.⁶]

¹ [Dodd v. Jones, 137 Mass. 322.]

² Insurance Co. v. Roth, 118 Pa. St. 329.]

³ [Harman v. Lewis, 24 Fed. Rep. 97 (Mo.), 1885.]

⁴ [Halsey v. Patterson, 37 N. J. Eq. 445.]

⁵ [Petty v. Willson, 4 L. R. Ch. Ap. 574.]

⁶ [Amis v. Witt, 33 Beav. 619.]

CHAPTER XX.

BENEFICIARIES.

ANALYSIS.

§ 399 D.

Beneficiaries.

endorsement "loss payable to B." is equivalent to an assignment with assent.

if A. agrees to insure for B.'s benefit, equity will protect B. to the extent of his interest, and after notice the company will pay A. at its peril.

two or more named as beneficiaries take equally.
one of several may assign to extent of his interest.
right of action.

§§ 399 E-399 K. Designation.

in the absence of provision to the contrary, *any* person may be named as beneficiary whether interested in the life or not, § 399 E.

although the charter describes the company to be for the benefit of widows and orphans, § 399 E.

a policy for the benefit of one not a relative nor interested in the life is not against *public policy*, § 399 E.

contra, § 399 E.; and see Mich. case, § 399 F.

and if it were, only the insurer could object, § 399 E.
sometimes express permission is given to designate any person whatever, § 399 E.

if the charter and by-laws limit the right of designation.
or express the method of doing it, the provision must be conformed to, § 399 F.

in some cases, however, only the company can object, § 399 F.

subsequent marriage revokes designation (?), § 399 H.

if the insured makes no successful designation, the fund goes to fulfil the *first* purpose named in the charter (widow), §§ 399 F, 390.

if no specific purpose is so named, the fund belongs to the company, § 399 F.

courts are liberal in upholding a designation, §§ 390, 399 I, 399 O.

administrators of assignee and of creditor, § 390.

child, §§ 399 F., 390, dying in life of father, § 399 N.

under the words "my wife Mary and children," a child by a former wife takes, § 399 G.

but not Mary's child by another, § 399 G.

"child" will not include grandchild, § 399 G.

contra, § 399 G.

except to keep funds from escheating to company,
§ 399 G.

may mean adopted child, § 399 G.

dependants, § 399 E.

family, § 399 N, may include housekeeper, § 399 F.

"friends," invalid designation, § 399 H.

grandchild, §§ 399 E, 399 G.

heirs, § 399 H.

mother, § 399 H.

uncle, § 399 H.

widow, §§ 399 F, 399 H.

wife, §§ 399 M, 390, 391, dying in life of husband, § 399 N.

Form of designation.

by indorsement required by charter, § 399 F.

by will, §§ 399 J, 399 F, 399 O.

by entry on records, §§ 399 F, 399 I.

the substance will be looked to, § 399 I.

and a parol designation may be sustained, § 399 I.

but not to show that the declarant meant to keep the
benefit for himself, § 399 I.

a transfer to the wife recorded is the same as an original
designation, 399 I.

direction on back of policy sufficient, § 399 I.

error in naming not material if not misleading, § 399 K.

Possession of policy and receipt of a relative may be a defence
to company against beneficiary if so provided, § 399 K.

§§ 399 L-399 M. The *Interest* of the beneficiary is a vested one the moment the policy is issued, unless the agreement contains a provision inconsistent with such a construction, and neither the person procuring the insurance nor the company, nor both, can by deed, will, or other act divest that interest (§§ 390, 391, 392, 399 L, 399 P, 399 Q; *contra*, slight authority, § 391), except by breach of condition without collusion, § 399 L, nor change it without consent of the beneficiary, at least so long as he lives, § 399 L; and some cases hold the interest is his not only irrevocably for his life, but in such sense as to pass to his heirs or representatives, though he die before the assured, § 390.

admissions of the assured are not those of the beneficiary, § 399 L.

only the beneficiary can surrender the policy, or put a charge on it, §§ 390, 399 P.

usually the beneficiary holds against creditors of the assured, § 390.

the company cannot set up the rights of creditors, § 390.

where the contract expressly permits change of beneficiary, there is no vested interest until the death of the assured, § 399 M.

§ 399 N.

Death of beneficiary before the assured (see also § 391) —

revokes appointment, and a new one may be made, unless the contract gives the benefit to the heirs or

§ 399 N (*continued*).

representatives of the first beneficiary, or otherwise provides for the contingency.
 often the share of the deceased goes to the other beneficiaries.
 the terms of the contract govern, and must be carefully considered.
 if the beneficiary is dead at the issue of the policy, the appointment is a nullity.

§ 399 O.

Change of beneficiary (see also § 390) —

may be made if there is an express provision for it, or the original contract is of character not to be irrevocable, or subsequent permission is given by the beneficiary, or he dies before the assured, and there is no provision inconsistent with a new designation, § 399 O, though some cases hold the interest passes to the beneficiaries' representatives without any special provision to that effect when he dies before the assured, § 390; but this does not seem reasonable. If I give to A. to take effect at my death, and A. dies first, the terms of the gift can never take effect; one ceases before the other arises. It may be well enough to hold me bound by what I have done, but not *beyond* what I have done. At the death of A. the *reason* of my gift, so far as I have expressed it, *ceases*. The appointment should be *prima facie* irrevocable while A. lives, and *prima facie* revoked by his death before me.
 retaining possession of the policy is evidence that the trust was revocable, § 399 O, unless the assured is one of the contingent beneficiaries; then his keeping it is natural, § 399 Q.
 the method prescribed by the charter or the policy must be followed, but the courts will not let third persons take advantage of slight informalities (Iowa *contra*), and equity will relieve where the assured has done all *he could*, and will even complete the change after his death, § 399 O.
 the company may waive defects, and their own neglect to complete the formalities will not protect them.
 if the reason for naming the first beneficiary has ceased, as where a girl breaks her engagement, equity will carry the fund where it was intended to go, and natural affection and the law of inheritance would place it, although the transfer was not made, the certificate demanded by the company being lost.
 the rule requiring surrender of the certificate does not apply when it is lost.

§ 399 P.

Surrender of the policy without assent of the beneficiary, and even non-payment of the premiums after such surrender, cannot affect the beneficiary where he has a vested interest, and he can follow a policy substituted for the old one.

- § 399 Q. Husband and Wife ; see also §§ 390, 391, 391 A, 394.
 assignment of policy by wife ; see also §§ 390, 391.
 N. Y. laws, § 399 Q.
 receiving part of fund from assignee a ratification, § 399 Q.
 ratification by wife of policy taken in her name by husband without authority, § 394.
 Georgia, § 399 Q.
 Tennessee, § 391.

[§ 399 D. **Beneficiaries.**¹— To comprehend the law of insurance we must keep in mind not only the insurer, the insured, and the holder of the policy, but also the beneficiary who may be still a fourth person. In determining the rights of one in whose favor another has caused insurance to be made as a voluntary benefit, we must take into account the language of the policy, the provisions of charter and statute, the relations of the parties at the time of insurance and of loss, and transactions between them regarding the matter, the rights of creditors, and the place of the contract. An indorsement on a policy that the loss if any should be paid to *B.* is an admission by the company that *B.* has an interest in the contract, and is to receive a benefit from it.² It is an assignment at the inception of the policy with consent of the company. If a mortgagor or vendee agrees to insure for the benefit of the mortgagee or vendor, the covenantee will in equity be entitled to the money to the extent of his interest, and the insurance company after notice will pay to the insured at their peril.³ If a benefit is given to several, no proportion being specified, they take equally, although named as heirs.⁴ For example, a benefit to “wife and children” goes to them equally, not one-half to the wife.⁵ One of several beneficiaries or contingent beneficiaries may assign the policy to the extent of his or her interest.⁶ The words “heirs or representatives” in a policy give a right of action to a daughter suing as sole heir.⁷ An

¹ [On this subject see 17 Abb. N. C. p. 21, note.]

² [Franklin v. National Ins. Co., 43 Mo. 491 at 496.]

³ [Grange Mill Co. v. Western Ass. Co., 118 Ill. 396.]

⁴ [Wilburn v. Wilburn, 83 Ind. 55.]

⁵ [Felix v. Grand Lodge, A. O. U. W., 31 Kans. 81.]

⁶ [Conn. Mut. Life Ins. Co. v. Baldwin, 15 R. I. 106.]

⁷ [Loos v. John Hancock Mut. &c. Co., 41 Mo. 538, 542.]

action of debt lies by the beneficiaries named in the death certificate of a mutual assurance.¹ If one having an interest in mortgaged property procure insurance in his own name, loss payable to the mortgagee, the latter may sue in his own name;² on the general principle that B. may sue on a promise made for his benefit to A. But in New Brunswick a beneficiary to whom the company have agreed to pay the insurance may not sue in her own name.³

[§ 399 E. **Designation of a Beneficiary.** — Where a company is organized to aid widows, orphans, and *dependants* of deceased members, a member who pays the premiums himself may, in the absence of any provision to the contrary in the charter or by-laws, name any one he pleases as beneficiary, although the person has no insurable interest in his life.⁴ A grandfather may insure his life and appoint his grandson to receive the money. No pecuniary interest is necessary in the beneficiary. Such a case is distinguished from one in which a person without insurable interest in the life of another procures insurance upon it and pays the premiums for his own speculative benefit.⁵ So a policy may be taken out on one's own life, and devised or otherwise made payable to a stranger not interested in the life of the insured.⁶ A policy of life insurance for the benefit of one not a relative is not against public policy, and if it were, no one but the insurer could raise the question. It could not avail his heirs.⁷ But in Ohio mutual companies must not issue certificates providing for the payment of money to any others than the family or heirs of the member; a contract to pay to assigns, or to one not a relation, is against public policy. It leads to gambling in the lives of venerable paupers.⁸ Sometimes a by-law gives each member a right to

¹ [Abe Lincoln Mut. Life & A. Soc. v. Miller, 23 Brad. 341.]

² [Berthold v. Clay Fire & Mut. Ins. Co., 2 Mo. App. 311 at 316.]

³ [Abbinett v. Northwestern Mut. Life Ins. Co., 21 N. B. R. 216.]

⁴ [Milner v. Bowman, 18 Ins. L. J. 708, Ind. June 22, 1889.]

⁵ [Elkhart Mut. Aid &c., Ass. v. Houghton, 103 Ind. 286, 291-292.]

⁶ [Bloomington Mut. Ben. Ass. v. Blue, 120 Ill. 121; Martin v. Stubbings, 126 Ill. 387.]

⁷ [Johnson v. Van Epps, 110 Ill. 551.]

⁸ [State v. Standard Life Ass., 38 Ohio St. 281, 298; State v. People's Ass., 42 Ohio St. 579.]

designate on the books of the lodge any person he chooses as beneficiary. And where there is no prohibitive or restrictive language in the charter any designation is good, although the charter describes the company as for the benefit of widows and orphans.¹ A benefit to go to the member's "family or as he may direct" passes to any beneficiary named, though not an heir or relative or member of the insured's family.²

[§ 399 F. *Charter and By-laws.* — A beneficiary can only be appointed in accordance with the charter and by-laws.³ No one can be named as beneficiary who is outside the *classes* specified in the charter.⁴ Neither a member nor the company nor the two combined can divert the corporate funds from these classes.⁵ If the charter of the association provides how and to whom the money shall be paid, the insured cannot change the beneficiary.⁶ Where a company was organized to secure insurance "to the family or heirs of any member on his death," a policy payable to one who was neither an heir nor a relation, and whose interest was not promoted by the continuance of the "life," was held void as against public policy.⁷ The term "family," however, will include a young woman keeping house for an old man many years, and treating each other as father and daughter.⁸ When the by-laws of an insurance company provide that the insured shall not by will or otherwise so dispose of the policy as to deprive his widow or his dependent children of its benefits, and further that the proceeds should be paid to the widow for the benefit of herself and dependent children, with a permission to appoint an executor to disburse the proceeds, the bequest by the insured of \$1000 out of a \$4000 policy to the widow, where she had \$2000 worth of other property, and the re-

¹ [Maneely v. Knights of B., 115 Pa. St. 305.]

² [Mitchell v. Grand Lodge K. of L., 70 Iowa, 360.]

³ [In re William Phillips' Insurance, 23 Ch. D. 235.]

⁴ [Mut. Ben. Ass. v. Rolfe, 76 Mich. 140.]

⁵ [American Legion of Honor v. Smith, 45 N. J. Eq. 466; Duvall v. Goodson, 79 Ky. 224.]

⁶ [Presbyterian Mut. Ass. Fund v. Allen, 106 Ind. 593.]

⁷ [Mut. Ben. Ass. v. Hoyt, 46 Mich. 473.]

⁸ [Carmichael v. Northwestern Mut. Ben. Ass., 51 Mich. 494.]

mainder of the policy proceeds to an only child who had no other property, was sustainable as a reasonable exercise of his discretion within the limits of the by-law.¹ If the by-laws provide for the naming of beneficiaries by indorsement on the back of the policy *signed and witnessed*, the signing is essential.² Where the money was to be paid to such person as the member might direct by will or entry on the records of the lodge or on the face of the certificate, and the member did designate his sister in the latter way, but without her knowledge or possession of the certificate, and after his death there was found in his pocket a writing without date addressed to his wife, stating that he wanted her to have all his effects, it was held that the sister must have the insurance.³ Where the statute authorizes the naming of legatees or devisees, but does not forbid the appointment of beneficiaries otherwise than by will, although the company might object if the designation were not made by will, the widow or other expectant could not.⁴ If a member of an association "to provide for the widow, orphan, heir, assignee, or legatee of a deceased member," designates his wife who dies, and he, after marrying again dies without further designation, the widow takes the insurance, because in that way the first purpose of the charter is fulfilled.⁵ If the charter is to provide for the "family or appointee" and a member dies without appointing a beneficiary, the wife and children take the fund.⁶ Otherwise, if the charter does not specify a definite purpose for the fund, where the constitution of a mutual society provides that the insured shall designate in writing a nominee to whom the money shall be paid at his death; if no nominee is designated the company is not liable to any one. If, however, the company is willing to pay the money it should go as part of the estate to the executor.⁷]

¹ [Roberts v. Roberts, 64 N. C. 695.]

² [Elliott v. Whedbee, 94 N. C. 115.]

³ [Highland v. Highland, 109 Ill. 366.]

⁴ [Martin v. Stubbings, 126 Ill. 387.]

⁵ [Relief Ass. v. McAuley, 2 Mackey (D. C.), 70.]

⁶ [Fenn v. Lewis, 81 Mo. 259.]

⁷ [Order of Mut. Companions v. Griest, 76 Cal. 494.]

[§ 399 G. "*Child*." — In case of a policy to "my wife Mary and children," a child by a former wife is a beneficiary.¹ To "be paid to his wife, M. K., and children," means to *his* children by this wife or others, not M. K.'s children.² Where "children" are named, parol evidence is not admissible to show that a grandchild was meant to be included.³ But where the charter provides that upon the death of a member intestate without widow or *child*, the fund shall vest in the company, the word "child" embraces grandchild.⁴ And a child of a deceased child-beneficiary, takes under the policy.⁵ Where a child by adoption is the only child, and circumstances show that the parties intended him to have the benefits of the policy, he will take as beneficiary under the term "children." ⁶]

[§ 399 H. *Mother, Uncle, Heirs, Friends; Subsequent Marriage*. — Although the constitution of a beneficiary association states that its object is to provide for "the widow and orphan," an application designating the mother of the assured as the beneficiary, accepted by the company, is binding under the statute of 1882, c. 195, § 2, which enlarged Public Statutes c. 115, § 8, so as to permit benefit associations to assist widows, orphans, "or other relatives of deceased members." And although the member subsequently married, the designation was not revoked.⁷ But in New York it has been held that where by the constitution and by-laws of a mutual society the insurance money is to go to the widow unless some other written designation is made by the insured to his lodge, if a member being unmarried designates his uncle and afterward marries, the marriage annuls the designation and the widow takes the funds.⁸ A life policy payable to heirs or assigns and never assigned is payable to the heirs, and they may

¹ [McDermott v. Centennial Mut. Life Ass., 24 Mo. App. 73.]

² [Koehler v. Centennial Mut. Life Ins. Co., 66 Iowa, 325.]

³ [Russell v. Russell, 64 Ala. 500.]

⁴ [Duvall v. Goodson, 79 Ky. 224.]

⁵ [Hull v. Hull, 62 How. Pr. 100.]

⁶ [Martin v. Aetna Life Ins. Co., 73 Me. 25.]

⁷ [Massachusetts Catholic Order of Foresters v. Callahan, 146 Mass. 391.]

⁸ [Sanger v. Rothschild, 50 Hun, 157, 161.]

claim the proceeds as against creditors.¹ The designation of "friends" as the beneficiaries is invalid; but the contract will be enforced in favor of the "heirs" to whom the money was to go on failure of "friends."²

[§ 399 I. *Form of Designation.* — Where a husband took out a policy on his life to himself and his representatives, but it was shown that he intended it for the benefit of his wife, and was given to her after marriage, and the husband frequently declared his intention to assign it to her, but never did so formally, it was held that the policy was the wife's and not an asset of the estate. Form must be disregarded to give effect to the intent of the parties.³ But *A.*, having an insurable interest in *B.*'s house, insured it in *B.*'s name, and as *B.*'s agent received the money after a loss. It was held that *A.* could not prove by parol that he intended to have the benefit of the policy himself.⁴ When at the time a policy was issued a transfer of it to the assured's wife was also made and recorded at the issuing office, it is the same as though her name had been inserted as beneficiary in the policy.⁵ A direction to pay to *A.*, written on the back of a policy payable to the writer, is sufficient.⁶]

[§ 399 J. *Designation by Will.* — A general designation by will is sufficient, at least by estoppel, if received and retained by the proper officers of the lodge as such designation without objection to its form.⁷ When the policy does not designate a particular beneficiary, but provides that it shall be paid subject to the will of the insured, and by will he gives his entire estate to *B.*, subject to testator's debts, the insurance goes to the executor, and he may sue for it in his own name.⁸ Where the insured has a mere power of appointment the benefit does not pass under a will disposing of all his estate, unless it

¹ [Mullins v. Thompson, 51 Tex. 7.]

² [Rindge v. N. E. Mut. Aid Soc., 146 Mass. 286.]

³ [Estate of Madeira, 16 Phil. 399.]

⁴ [Looney v. Looney, 116 Mass. 283 at 286.]

⁵ [Succession of Richardson, 14 La. Ann. 1.]

⁶ [Eppinger v. Canepa, 20 Fla. 262.]

⁷ [Kepler v. Supreme Lodge, 45 Hun, 274.]

⁸ [Winterhalter v. Workmen's Guarantee Fund Ass., 75 Cal. 245.]

specifically makes the appointment.¹ Whether a solvent testator can by will dispose of the proceeds of a policy on his life payable to his legal representatives, *quaere*.²

[§ 399 K. *Error in Name ; Possession of Policy*. — When a policy provided that the loss, if any, should be payable to the North Western Life Insurance Company, it is immaterial that the company's name is the North Western Mutual, &c.³ Where it was provided in the policy that "the production by the company of this policy and a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is the beneficiary, or —, or relative by blood of the assured, shall be conclusive evidence that such sum has been paid and received by the person or persons lawfully entitled to the same, and that all claims and demands upon said company under this policy have been fully satisfied," it was held that payment to the *daughter* of the insured, who produced the policy and premium book and her receipt, were a complete defence to the company against the beneficiary.⁴]

[§ 399 L. *The Beneficiary takes a Vested Interest the moment the Policy is issued*, unless the agreement by charter or otherwise contains a provision inconsistent with such a construction.⁵ A life policy and the money that may become due on it belong the moment it is issued to the beneficiary named in it, and the person procuring the insurance has no power by deed, assignment, or will, surrender of the policy and issue of a new one, or by other act, to transfer the interest to any one else.⁶ His right cannot be affected by any acts of

¹ [Duvall v. Goodson, 79 Ky. 224.]

² [Blonin v. Phaneuf, 81 Me. 176.]

³ [North Western Mut. Life Ins. Co. v. Germania Fire Ins. Co., 40 Wis. 446 at 451.]

⁴ [Metropolitan Life Ins. Co. v. Shaffer, 50 N. J. 72.]

⁵ [See §§ 390, 391.]

⁶ [Central Bank of Washington v. Hume, 128 U. S. 195; Pingrey v. National Life Ins. Co., 144 Mass. 374; Bayse v. Adams, 81 Ky. 368; Weisert v. Muehl, id. 336; Wilmaser v. Continental Life Ins. Co., 66 Iowa, 417; Allis v. Ware, 28 Minn. 166; City Savings Bank v. Whittle, 63 N. H. 587. So far as it concedes a right of revocation in the party insuring; Conig Land v. Smith, 79 N. C. 303, is overruled. Hooker v. Sugg, 102 N. C. 115, 120; Conn. Mut. Life Ins. Co. v. Baldwin, 15 R. I. 106; Wilburn v. Wilburn, 83 Ind. 55.]

the assured subsequent to the execution of the policy,¹ except it be a breach of condition; unless by charter or otherwise it is a part of the original agreement that the beneficiary may be changed, or the beneficiary and the person procuring the insurance enter into an agreement as to what control each shall exercise over the policy. Then the indefeasible interest otherwise vesting in the beneficiary may not arise.² If A. takes out a policy for his children, the interest vests in them, and if A. afterwards surrenders the policy on receiving the cash value of it, he is liable to the children for the amount.³ No admissions of the assured subsequent to the policy are admissible against the beneficiary.⁴

[§ 399 M. *When there is no Vested Interest until Death of Assured.*⁵ — In those companies, however, that expressly permit a change of beneficiary without consent of the former appointee, the person first designated acquires no vested interest during the life of the insured, but only an expectancy.⁶ As where the policy provides for change.⁷ The wife has no vested interest which she can assign or devise until the death of her husband. If she dies first, her interest terminates and does not go to her heirs or representatives.⁸]

[§ 399 N. **Death of Beneficiary.** — If the beneficiary die, another may be named,⁹ unless the charter or contract fixed the benefit in the heirs or representatives of the first beneficiary. The death of the beneficiary before the assured is a revocation of the appointment. So where the insured named his wife S. to receive the money, and S. dying, he married P., it was held that P. was entitled to the money, under the general

¹ [Kline v. National Ben. Ass., 111 Ind. 462.]

² [Splawn v. Chew, 60 Tex. 532; Ricker v. Charter Oak Ins. Co., 27 Minn. 193.]

³ [Waldrom v. Waldrom, 76 Ala. 285.]

⁴ [Supreme Lodge &c. v. Schmidt, 98 Ind. 374.]

⁵ [See § 391.]

⁶ [Martin v. Stubbings, 126 Ill. 387; Union Mut. Life Ins. Co. v. Stevens, 19 Fed. Rep. 671 (Ill.), 1883; Supreme Conclave, Roy. Adelpia v. Cappella, 41 Fed. Rep. 1 (Mich.), 1890; Mut. Ass. v. Montgomery, 70 Mich. 587.]

⁷ [Holland v. Taylor, 111 Ind. 121; Masonic Mut. Ben. Soc. v. Burkhart, 110 Ind. 189.]

⁸ [Mutual Ben. Ass. v. Rolfe, 76 Mich. 146.]

⁹ [Van Bibber's Adm. v. Van Bibber, 82 Ky. 347.]

provisions of the by-laws respecting cases of failure to designate a beneficiary.¹ If the beneficiary dies in the lifetime of the assured the policy may devolve on the latter.² As where a policy is for the benefit of the children of the insured and some of them die during the "life," a share of their interest passes to the insured, and at his death vests in his representatives unless he made some other proper designation.³ Where a policy is issued on the life of C. in favor of his wife and children, share and share alike, or their legal representatives, if one of the children die in the life of C., a portion of the child's interest goes to the father C., and may be verbally pledged by him as security for a debt.⁴ A wife beneficiary died in the lifetime of her husband A., the insured, leaving five children. On the death of A. his administrator has a right to one-sixth of the insurance money.⁵ When A. insured his life for the sole and separate use of his wife, and in case of her death for her children,⁶ and she and her children die in the life of A., the beneficial interest is then in A., and a son of his by a former wife may inherit the funds. Where S. insures his life in a sum payable to himself and his assigns for the benefit of his wife, and she dies leaving S. and two children, one-third of the policy goes to S., and two-thirds to the children, as heirs of the wife, subject to the right of her administrator to collect the whole; and H., to whom S. assigned the policy for debt, has no claim upon it except to the extent of the one-third that has come to S. and the premiums paid by H.⁷ In North Carolina, where A. insures his life for the benefit of his "wife and children," if his wife dies before him her share will go to her administrator, and the surplus above her debts to the administrator of A., and be liable for his debts. If the wife is dead at the issuing of the policy her name in the policy is a

¹ [Given v. Wisconsin O. F. M. L. Ins. Co., 71 Wis. 547, 551.]

² [Wicksteed v. Munro, 10 Ont. R. 283, R. S. O. Ch. 129, § 14.]

³ [Shields v. Sharp, 35 Mo. App. 178; Conn. Mut. Life Ins. Co. v. Baldwin, 15 R. I. 106.]

⁴ [Macaulay v. Central Nat. Bank, 27 S. C. 215.]

⁵ [U. B. Mut. Aid Soc. v. Miller, 107 Pa. St. 162.]

⁶ Libby v. Libby, 37 Me. 359.]

⁷ [Harley v. Heist, 86 Ind. 196.]

nullity. If one of the two children die before A. the insurance money will be divided between the surviving child and the administrator of the dead child.¹ If a father takes out a policy on his life in favor of his daughter, the contract of the company is with the latter, and upon her death the legal title to the insurance passed to her legal representative who is entitled to demand possession of the policy, and the father must deliver it to him.² The personal representatives of any beneficiaries who die before or after the insured take their share of the insurance.³ Where, if the wife dies before the husband the fund is to go to their three children, the personal representatives of a child dying after the mother but before the father take its share, and not the grandchildren.⁴ Where J. insures his life, payable to himself if he lives thirty years, if not then to his father, W., and the latter dies first, his administrator may recover the insurance on J.'s death within thirty years.⁵ If payment is to be made to "wife or legal representatives of the assured," the administrator or executor of the assured takes in case the wife dies before him.⁶ Where the beneficiary was named as Mrs. H. M. Case, or law-heirs, and the lady manifestly intended was Mrs. A. M. Case, who died, and the insured afterward married Emma Case, the insurance lapsed as to the Mrs., and the heir Inez H. Case took the fund.⁷ Where the beneficiary named is the "family" of the insured, consisting at the time of insurance of wife and daughter, and the daughter marries, and she and her husband and children reside with her father until her death, on the subsequent demise of the father the wife takes the whole insurance as being the whole "family."⁸ If the money is to go to the wife and five children equally and one child dies after the insured, the whole goes to the widow and four remaining

¹ [Hooker v. Sugg, 102 N. C. 115.]

² [Glanz v. Gloeckler, 104 Ill. 573. See also 10 Brad. 484.]

³ [Drake v. Stone, 58 Ala. 133.]

⁴ [United States Trust Co. v. Mutual Ben. Life Ins. Co., 115 N. Y. 152.]

⁵ [Mumford v. Mumford, 19 N. S. R. 210.]

⁶ [Johnson v. Van Epps, 110 Ill. 551.]

⁷ [Day v. Case, 43 Hun, 179.]

⁸ [Brooklyn Masonic Relief Ass. v. Hanson, 53 Hun, 149.]

children.¹ Where a policy runs to the wife S. and "their children," and she dies, and the insured marries again, a surviving child of S. takes the whole fund, and not the children of the second marriage.²

[§ 399 O. **Change of Beneficiary.** — If there is express provision for change, or the original contract is of a character that shows it was not irrevocable, or subsequent permission is obtained from the beneficiary, or the beneficiary dies before the assured and there is no provision inconsistent with a new appointment, a new designation may be made in the mode prescribed if there is one, but the courts lean to upholding a designation if clear though defective in form. Where the policy stipulates that it is a contract with the insured and not with beneficiaries, and provides for change of designation, even this may be done after the certificate has been handed to the beneficiary first named, with the remark by the insured that he gave her (his wife) the insurance.³

In New York the superior court remarked that whatever may be said of the case where the policy is handed over to the beneficiary, one who insures his life in trust for his children, but *retains possession* of the policy and pays the premiums, shows that he does not intend to make the trust irrevocable, and may surrender the policy and take out a new one for some other beneficiary. It is a mere gratuity, and there are many reasons why it should be regarded as revocable.⁴ The insured may change the beneficiary on the books of the company, if the prior beneficiary paid nothing.⁵ If the beneficiary dies before the assured he may change the designation.⁶ If a policy is payable to the wife or legal representatives of the assured and the wife dies, the insured will have the same power over it as if originally payable to himself.⁷ Where the

¹ [Covenant Mut. Ben. Ass. v. Hoffman, 110 Ill. 603.]

² [Lockwood v. Bishop, 18 Ins. L. J. 491 (N. Y.), special term, 1876.]

³ [Catholic Knights of America v. Morrison, 18 Ins. L. J. 479 (R. I.), Feb. 89.]

⁴ [Garner v. Germania Ins. Co., 13 Daly, 255, 261-262.]

⁵ [Lamont v. Hotel Men's Mut. Ben. Ass., 30 Fed. Rep. 817 (Ill.), 1887.]

⁶ [Olmstead v. Keyes, 85 N. Y. 593 (wife); Bickerton v. Jaques, 12 Abb. N. C. 25 (sister).]

⁷ [Johnson v. Van Epps, 110 Ill. 551.]

organic law or the by-laws provide a specific method for changing the beneficiary, as by issue of a new certificate on a written order to the secretary, it must be done in that way, and cannot be accomplished by the will of the member.¹ If the policy is payable to A., unless a different payee is designated by an order acknowledged before a justice of the peace, designation by an ordinary will is not sufficient to change the payee.² In a Kansas case, where a written request was sent to the company by order of the insured while on his death-bed, and the company thereupon issued a new certificate in accordance with the request, the change was held good, although some of the formalities required by the constitution of the Lodge had not been complied with. The Olmstead case was commented upon as differing, in the fact that the company had issued no new certificate in that case; and the rule was laid down that a by-law merely directory and for the benefit of the association could not be taken advantage of, by outside parties claiming the insurance,³ — against the beneficiary appointed by means recognized by the company, I think, should be added. In Iowa, however, it is held that the company or the beneficiary who would take if the informal designation had not been made, may raise the objection.⁴ In the Federal courts it is more sensibly held that the rule that the method of designation laid down in the policy and by-laws must be followed, is subject to three exceptions. (1) The society may waive the rules. (2) If it is beyond the power of the assured to comply with the rules equity will relieve; and (3) If the assured has pursued the rules and done all in his power to change the beneficiary, but dies before the new certificate is issued, equity will treat the certificate as issued.⁵ If the policy is issued on the "express condition that the assured may with the assent of the company assign or change

¹ [Olmstead v. Benefit Society, 37 Kans. 93; Stephenson v. Stephenson, 64 Iowa, 534; Holland v. Taylor, 111 Ind. 121; American Legion of Honor v. Smith, 45 N. J. Eq. 466.]

² [Mellows v. Mellows, 61 N. H. 137.]

³ [Titsworth v. Titsworth, 40 Kans. 571, 576.]

⁴ [Wendt v. Iowa Legion of Honor, 72 Iowa, 682.]

⁵ [Supreme Conclave, &c. v. Cappella, 41 Fed. Rep. 1 (Mich.), 1890.]

the beneficiary," or if the constitution of the company so provides, the designation is not irrevocable, and where the insured has made a valid promise and an effort to change the designation but died before it is accomplished, equity will consider that to be done which ought to be done, and hold the right transferred.¹ Where the charter of the company recognizes the right of a member to designate the beneficiary by will, a by-law providing that "no change of designation shall be made or recognized until submitted to and approved by the board of directors," will not be sustained to defeat a changed designation by will not so approved.² Where C. made D. (to whom he was engaged) his beneficiary, and she afterward broke the engagement and married another, and C. clearly indicated his intent to pass the insurance to his son and a stranger G., but did not succeed in getting a new certificate because the old one was lost, and the insurer demanded its surrender, equity, on the death of C., gave the fund to the son. The reasons for making D. the beneficiary had ceased to exist, and the fund should go where natural affection and the law of inheritance would place it.³ And the rule requiring the surrender of the old certificate in order to change the beneficiary cannot apply when the certificate is lost.⁴

[§ 399 P. **Surrender of Policy; Non-Payment of Premiums.** — While the beneficiary lives no surrender of the policy without his assent,⁵ or non-payment of premiums after such surrender, will defeat his right. A surrender of the policy by the husband for the wife is ineffectual if without her authority.⁶ If a husband takes out a policy on his life for the benefit of his wife and child, they acquire a vested interest in it at the moment of its delivery to the insured, although no knowledge of it comes to them until after his death, and he cannot defeat their rights by a surrender

¹ [Nally v. Nally, 74 Ga. 670; Martin v. Stubbings, 126 Ill. 387.]

² [Raub v. Masonic Mut. Relief Ass., 8 Mackey (D. C.), 68.]

³ [Grand Lodge v. Child, 70 Mich. 163, 170, 171.]

⁴ [Grand Lodge v. Child, 70 Mich. 163.]

⁵ [Manhattan Life Ins. Co. v. Smith, 44 Ohio St. 156; Garner v. Germania Life Ins. Co., 110 N. Y. 266.]

⁶ [Matter of Booth, 11 Abb. N. C. 145.]

without their assent ; and although the policy may be forfeited for non-payment of premiums, yet non-payment of premiums *after* such an attempted wrongful surrender without notice to the beneficiaries will not forfeit the policy.¹ If husband, by agreement with insurance agent, allows policy to lapse and takes out a new one, the wife can hold the substituted policy.² If a husband exchanges the policy for a paid-up policy, and afterwards surrenders this on receiving a certificate of its value, the wife, knowing nothing of the whole matter until after his death, may adopt his exchange and repudiate his surrender, and compel the company to pay her, although the certificate had been paid to an assignee.³ Failure to pay premiums after surrender of a policy with a forged release of the beneficiary is no defence against the beneficiary.⁴ But if the beneficiary dies in the lifetime of the insured, the latter may surrender the policy and take out a different one without consent of the representatives of the deceased beneficiary.⁵ When a policy was payable to B's wife or her representatives, and she paid the premiums, she died in B's life, and he contrived with the company to let the policy lapse by non-payment of premiums, and took out a new policy to himself and his representatives, the old policy being really a part consideration for the new one. On B's death, it was held that the funds should be divided between the administrators of B. and of the wife in proportion to the amount of premiums paid by their respective intestates.⁶]

[§ 399 Q. **Husband and Wife.** — A policy on A.'s life payable to his wife is her property and may be assigned by her if the law of her domicil allows her to sell and convey her property.⁷

¹ [Whitehead v. N. York Life Ins. Co., 33 Hun, 425 ; 102 N. Y. 143, 156 ; Whitehead v. N. Y. Life Ins. Co., 63 How. Pr. 394 ; People v. Globe Mut. Life Ins. Co., 65 How. Pr. 239.]

² [Barry v. Brune, 71 N. Y. 261 ; Brockhaus v. Kemna, 7 Fed. Rep. 609 (Wis.), 1881 ; 10 Biss. 338 ; 10 Ins. L. J. 632.]

³ [People v. Globe Mut. Life Ins. Co., 15 Abb. N. C. 75. Compare Newcomb v. Almy, 96 N. Y. 308.]

⁴ [Schneider v. United States Life Ins. Co., 52 Hun, 130.]

⁵ [Bickerton v. Jaques, 28 Hun, 119.]

⁶ [National Life Ins. Co. v. Haley, 78 Me. 268.]

⁷ [Damron v. Penn Mut. Life Ins. Co., 99 Ind. 478.]

Where a man takes out a policy that will give him a fund if he lives till a time stated, and if he dies will secure a fund to his wife, she has a vested interest which she can transfer by assignment,¹ although the husband retained possession of the policy. He naturally would do this in case of such a policy on account of his own interest in it. But if the whole beneficial interest in the policy is in the wife, it has been held in New York, that she could not assign it by reason of statute protection.² And by the New York Laws of 1879 a wife's interest in a policy on her husband's life is assignable by her with the written consent of her husband.³ And the assignee need not have an insurable interest.⁴ Since the act of 1873, however, the wife may assign a policy in which the children are not interested.⁵ Where a wife is to be the beneficiary if she survives her husband, but if not her children are to have the money, her assignee stands in no better position than she does, and if after assignment the wife dies in the lifetime of her husband the children may recover the fund.⁶ Where the wife after the death of her husband received from the assignee a part of the proceeds, it was held a ratification.⁷ If the wife transfers the policy during coverture to secure a debt of her husband, the assignment is void, and if after his death she ratifies the transfer with consideration, it is still void.⁸]

¹ [Fowler v. Butterly, 44 N. Y. Super. 148, 159.]

² [De Jonge v. Goldsmith, 46 N. Y. Super. 131; Brummer v. Cohn, 58 How. Pr. 239; 62 id. 171, Laws of 1840 Ch. 277; Mutual Life Ins. Co. v. Ferry, 62 id. 325 (assignment though made in another State is void); Eadie v. Slimmon, 26 N. Y. 9; Barry v. Brune, 71 N. Y. 261; Wilson v. Lawrence, 76 N. Y. 585.]

³ [Whitehead v. N. Y. Life Ins. Co., 63 How. Pr. 394.]

⁴ [St. John v. American Mut. Life Ins. Co., 13 N. Y. 31.]

⁵ [Brick v. Campbell, 54 N. Y. Super. 305.]

⁶ [Brown's App., 125 Pa. St. 303.]

⁷ [Robinson v. Mutual Ben. Ins. Co., 16 Blatch. 194 (N. Y.), 1879.]

⁸ [Smith v. Head, 75 Ga. 755.]

CHAPTER XXI.

OF THE RISK, ITS DURATION AND EXTENT.

ANALYSIS.

§ 400.

When the Risk Begins.

Time is of the essence of the contract. The risk attaches from the date of the policy if delivered, unless a contrary intent appears. The consummation of the contract may, however, be prior to the delivery of the policy (see chap. iv.). All the circumstances and provisions are to be taken into account to determine the intent of the parties on principles of justice. Day of date included.

A risk cannot attach before the organization of the company is completed so far as to authorize it to take the risk.

§ 401.

When it terminates.

Time in remote part of the world must be reduced to the time at place of contract.

Fire breaking out before expiration of policy but actual loss afterward, recovery?

Injury within time causing death after expiration of the policy, or after ninety days from accident, no recovery.

Last day named included.

If no duration is specified, a reasonable time is understood.

While drying hops, suspension during burning of forests "for ten days prior to shipment," terminates in ten days or on shipment.

"Until landed."

§§ 401 *a*-401 C. Place is often material, § 401 *a*. It may always be made so by explicit language, § 401 C, and the description of goods as at a certain place is frequently held a continuing warranty, § 401 B; but the nature and use of the property is to be considered, and the insurance will not fail because goods are away for repairs, or a team is in pasture or field instead of barn, § 401 C. Insurance of goods on shipboard covers them while on the steam launch, § 401 C. Property in ordinary use away from place of deposit is protected. See also § 420.

§ 402.

The Risk and what it includes.

In the absence of specification, loss by fire, accident, death, or any other cause insured against is within the policy, *whatever the manner* of loss, *e. g.*, ignition is not necessary to claim under a fire policy. The insurers are not liable, however, for loss by an excessive use of heat purposely applied, as in over-roasting coffee, § 402 and *n.* Insurance against statute liability does not cover common-law liability. Ice included in river perils in spite of parol understanding to the contrary (?). Wind. Hail. Capture. Insuring a ship for voyage A. does not cover voyage B.

§ 403.

"Usurped power." "Civil Commotion."

Mobs. Riots. Proximate cause.

"Resistance to authority" held not to include action of a group of escaping convicts.

§ 404.

Injury by water and removal or theft in consequence of *bona fide* and *prudent* efforts to save from fire, are within policy. Such efforts must be encouraged. In many cases the property would burn if not for the water or removal.

§ 405.

Smoking. Goods illegally kept for sale.

§ 406.

Lightning policy. Loss by tornado and lightning covered.

§ 407.

Misconduct. Fraud. Suicide. Wilful destruction of property fatal to claim under the policy unless loss was certain any way. (See also § 411.)

§ 407 A.

If loss is caused by wrongful act of third person or by assured while insane, the company is liable.

Company liable.

violation of orders by guests.

neglect of captain to register goods.

incendiarism.

by stranger.

by wife.

by assured while insane.

§ 408.

Negligence.

Mere negligence, however great, if short of fraud, is covered by the policy, § 408. See also § 410.

And if only the *remote* cause of loss is no defence even when the policy expressly excepts loss by negligence, § 408.

§ 409.

Wilful exposure. General current of authority is that even the utmost recklessness is no defence on a life policy unless so expressed.

§ 409 A.

Exposure to obvious and unnecessary danger.

going along railroad track at night is.

crossing in daytime may be.

going to rescue of wrecked crew not.

§ 410.

"Design." Gross negligence not fraud, though it may be evidence of it.

- § 411. *Misconduct* avoids a policy.
It differs from negligence. It is said that misconduct is a violation of definite law ; carelessness is an abuse of discretion under an indefinite law. Misconduct is a forbidden act, carelessness a forbidden quality of an act. If the element of *wilfulness* comes in, we have misconduct or fraud, not negligence.
- § 411 A. Marine Insurance, Negligence, Barratry, Theft.
- § 412. If after a fire is out the weakened walls fall and crush an adjoining building, this loss is within a policy against damage by fire. Otherwise if seven days after the fire a gale blows the walls down, or walls fall from inherent weakness before there is any fire.
- §§ 413-416. *Spontaneous Combustion* (§ 413) is within a fire policy (*contra*, § 413 n.), and an explosion would seem also within it, § 413, but is frequently excepted, § 415.
Explosion *incident* to a fire not within the exception, § 416. nor one resulting from the business insured, § 415.
Concussion not within a fire policy, § 414. (Distinction rather fine.)
There are numerous cases, in some of which the insured was injured by explosion following fire, and in others by fire following an explosion, and conditions and opinions are various. See also § 418.
Bursting of boilers, § 415.
- § 417. *Collision*. If a vessel injured by collision and afterwards taking fire would have gone to the bottom and been totally lost without the fire, the loss is not by fire ; but if the fire was an essential factor in the vessel's loss, it comes within the policy, § 417.
It is sometimes difficult to tell how far to carry the rule excluding a remote cause. See §§ 417, 417 A, 419.
- § 419. Intemperance. Accident, &c. Proximate cause.
Intemperance causing acts of exposure which produce death, is the cause of death.
- § 419 A. Rules of company against intemperance must be obeyed.
"sober and temperate" does not imply total abstinence.
"seriously impair health" means *his* health ; evidence that he drank enough to impair ordinary health not sufficient.
excessive drinking violates warranty against pernicious habit obviously tending to shorten life.
Evidence. Beneficiary not estopped by doctor's statements.
Agent's knowledge may prevent company from insisting on condition against intemperance.
and yet *death* from intoxication may avoid the policy.
- §§ 420-421. WHAT PROPERTY IS COVERED.
doubt resolved against company, § 420.
wearing apparel, § 420.
linen, stock, furniture, fixtures, jewelry, merchandise, plate, refined oil, house, ship-yard, cars, unfinished

house or boat, lumber, mill, factory, machinery, tools, grain, cattle, § 420.
 stock of hair, iron, corn, rice, fur, freight, § 420 A.
 additions, goods in outbuildings or on a hired vessel, § 420 B.
 what is covered, question for jury, § 420 A.
 evidence admissible to show what was meant to be included, §§ 420, 420 A.
 misdescription disregarded if sufficient to identify, § 420 A.
 usage received in favor of assured, § 420 A.
 after-acquired stock covered, § 420 B.
 "lost or not lost," § 420 B.
 goods included by mistake, company not liable, § 420 B.
 other goods shipped *in place* of those described, not covered, § 420 B; premium recovered.
 indorsement of specific goods, secretary cannot waive the condition, § 420 B.
 New York mutual companies may insure foreign residents and property, § 420 B.
 goods in trust and bailments, § 420.

§ 400. **Duration of the Risk; When it commences; "Time of Insurance;" Time of Death.**—Time is material in the contract, and as a general rule the policy, if delivered, takes effect from its date, unless it be otherwise stated, as that it shall not be valid till the premium be paid, or some other condition be complied with, and then upon the payment of the premium or compliance with the required condition, or a waiver of either, it covers the subject-matter of insurance from the date of the policy, unless there is evidence of a contrary intent.¹ If the premium be paid, and the policy be not delivered till afterwards, the policy takes effect by relation as of its date, even though a loss intervenes.² If it be delivered, but upon the express stipulation that it is to take effect on a certain day, that stipulation will control;³ or, upon the express understanding that it is not to take effect till another

¹ *Ruse v. Mut. Ben. Life Ins. Co.*, 23 N. Y. 516; *Whitaker v. Farmers' Union Ins. Co.*, 29 Barb. (N. Y.) 312; *Hallock v. Com. Ins. Co.*, 2 Dutch. (N. J.) 268; s. c. affirmed, 3 id. 645; *ante*, §§ 57, 58, 64, 65.

² *Lightbody v. N. A. Ins. Co.*, 23 Wend. (N. Y.) 18; *City of Davenport v. Peoria Mar. & Fire Ins. Co.*, 17 Iowa, 276.

³ *American Horse Ins. Co. v. Patterson*, 28 Ind. 17; *Western v. Genesee Mut. Ins. Co.*, 2 Ker. (N. Y.) 258.

policy has been surrendered, it will not relate back so as to cover a loss which occurs prior to the required surrender.¹

In *Isaacs v. Royal Insurance Company*,² it was queried whether a policy from a certain day to a certain other day would cover a loss on the first-mentioned day; but in Massachusetts it has been held that a lease from the "first day of July" takes effect on the second day of July.³ "From the day of the date," and "from the date," were formerly held to be distinguished in that, in the computation of time, it was reckoned from the day in the former case, and excludes it, while in the latter it was reckoned from the act or thing done, and includes the day on which it is done.⁴ But it has since been held in England that the two phrases mean the same thing, and that the rule of inclusion or exclusion applies according to the intent of the parties, to be derived from the context. In this country, however, there is, in some courts, an inclination to adhere to the distinction.⁵ It is impossible, however, to reconcile the decisions either with the rule of inclusion or exclusion. The circumstances and intent of the parties are to control; and such construction should be given as will operate most to the ease of the party entitled to favor, and by which rights will be secured and forfeitures avoided.⁶ And where the policy was in fact a reinsurance, and was for a year, but specifying no time when the year was to begin, it was held that it began from the date of the prior policy, though that was some months prior to the issue of the latter policy.⁷

The time of insurance, within the meaning of a policy which provides that it is not to take effect if the subject of insurance is deceased "at the time of insurance," is not necessarily identical with the date of the policy. By its special

¹ *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328.

² 39 L. J. Exch. 189.

³ *Atkins v. Sleeper*, 7 Allen (Mass.), 487.

⁴ *Sir R. Howard's Case*, 2 Salk. 625.

⁵ *Atkins v. Sleeper*, 7 Allen (Mass.), 487; *Blake v. Crowninshield*, 9 N. H. 304; *Cornell v. Moulton*, 3 Denio (N. Y.), 12; *Weeks v. Hull*, 19 Conn. 376.

⁶ *O'Connor v. Towns*, 1 Texas, 107.

⁷ *Phila. Life Ins. Co. v. Am. Life Ins. Co.*, 23 Pa. St. 65.

terms the policy may provide that the insurance shall run from a certain day prior to its date to a certain day subsequent thereto; and if the death of the subject-matter of insurance intervene between the first date and the date of the policy, it will be a loss covered by the policy. When the policy itself covers a period antecedent to its date, and does not specify the contingency upon which it shall take effect, the date of the policy or of its actual delivery becomes of little or no importance in determining when the insurance takes effect.¹

[A mutual company is not liable for a loss occurring after application, but before the company has received the final certificate of the auditor. Up to that time it has no power to contract. The insured seeks membership, and he must be charged with knowledge of the charter. Even if the agent represented to him that the insurance bound the company from the date of application the company is not estopped.² A provision that no benefits will be due or payable if death occurs within three months from the date of the policy, is valid.³ In general, insurance on goods from *A.* to *B.* by a certain ship commences when the goods are put on board.⁴ When the underwriter stipulated verbally that if the ship did not sail in five days he would not be liable, and where because of danger of capture she did not sail for a month, the policy was held good as the stipulation was not contained therein.⁵]

“While lying in Victoria Dock, with liberty to go into dry dock,” covers the passage to and from the dry dock, but not a period occupied on the way for repairs;⁶ and “while loading at *B.*” covers the period while the vessel is at *B.* for the purpose of loading, whether she be actually engaged in loading or not.⁷ A “port risk” protects only while the vessel is

¹ *American Horse Ins. Co. v. Patterson*, 28 Ind. 17; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96.

² [*Manuf. & Merchant's Mut. Ins. Co. v. Gent*, 13 Brad. 308.]

³ [*Bruton v. Met. Life Ins. Co.*, 48 Hun, 204.]

⁴ [*Mobile Mar. D. & Mut. Ins. Co. v. McMillan*, 31 Ala. 711 at 723.]

⁵ [*Whitney v. Haven*, 18 Mass. 172 at 173.]

⁶ *Pearson v. Commercial Union Ass. Co.*, 45 L. J. C. P. 761.

⁷ *Reed v. Merchants' Mut. Ins. Co.*, 95 U. S. 23.

in port, and prior to the commencement of the voyage by leaving the wharf.¹

§ 401. **Duration of the Risk ; When it terminates.** — When the fire breaks out before the expiration of the policy, but the property is not consumed till after, the whole damage, says Alauzet, would be considered as occurring at the time the fire breaks out.² It would hardly be contended, however, that death after the expiration of the policy, the result of a disease contracted however recently before, would be within the protection of the policy. If the death or loss should happen in a remote part of the world, the difference of time might give rise to the question whether the death was before the hour fixed as the termination of the policy. In order to give the insured the benefit of the exact time, no more and no less, the time of death, where it occurred, whether in east or west longitude, and therefore earlier or later than the actual time, must be reduced to the time of the place of the contract.³ Insurance from a given day until a certain other given day, and for so long after as the insured shall pay the premium paid on the first day, extends to and includes the latter day, it being the evident intention that the policy is to be renewed, as any other construction would leave the insured without protection on each day of renewal.⁴ A comparatively recent case in Massachusetts presented a question of some complication as to the time covered by the policy. The policy was dated Oct. 5, 1866, and contained the following clauses : “ This policy of insurance is for the period of twelve months, commencing at twelve o’clock (noon) on the fifth day of October, 1866, and terminating at twelve o’clock (noon) on the fifth day of October, 1867,” “ against loss of life . . . to be paid within ninety days after sufficient proof that the assured at any time after the date hereof, and before the expiration of this policy shall have sustained per-

¹ *Nelson v. Sun Ins. Co.*, 71 N. Y. 453. See also 2 *Parsons, Mar. Ins.* 53 *et seq.*

² *Des Ass.*, 2, § 461.

³ *Schofield v. Jones*, 2 *Ins. L. J.* (Eng.) 640 *b.*

⁴ *Isaacs et al. v. Royal Ins. Co.*, 22 L. T. 681. The court take pains to say, in this case, that they do not wish to give any opinion as to whether the first day is also included.

sonal injury caused by any accident within the meaning of this policy, . . . and such injuries shall occasion death within ninety days from the happening thereof." On the eleventh day of December 1866, at nine o'clock in the forenoon, the insured met with an accident, in consequence of which he died on the 12th of March, 1867, about nine o'clock in the forenoon. Upon these facts the court (Chapman, C. J.) says:—

"No computation of time will bring the death within ninety days from the happening of the accident. But the rule of computation is stated in *Atkins v. Sleeper*.¹ When time is computed from an act done, the general rule is to include the day. When it is computed from the day of the act done, the day is excluded. The language of the instrument requires that the computation be made from the time of the act done, namely, the accident.

"But it is contended that as this is an insurance for twelve months, the provision by which it is attempted to exempt the company from liability for the death of the insured, happening from a cause within the meaning of the policy during said term, is inconsistent with the general object and tenor of the policy, and is void. No such inconsistency is apparent to the court. On the contrary, the policy clearly describes the cases in which the loss of life shall make the company responsible, and limits the liability to such cases. It is further contended that if the provision in the policy that the injuries shall occasion death within ninety days can have any legal force or effect, it must be construed to mean such injuries as shall occasion death within ninety days after the termination of the twelve-month. But as the ninety days are expressed to be from the happening of the accident, this construction cannot be accepted. It is said that unless the clause be void, or be construed as above stated, an effectual life insurance for more than ninety days was impossible. If this were so, it would be the result of the terms of the contract upon which the action is brought. But here is simply an insurance against certain accidents which may happen within a given time, and result

¹ 7 Allen (Mass.), 487.

fatally within a given time after they happen.”¹ Where the risk is to continue till the voyage is stopped by ice or the closing of navigation, it will be a question for the jury where the voyage was stopped, if the circumstances and causes are in dispute.² Where the insurance was upon a certain building for a specified time, while drying hops, a loss during the time specified, but after the insured had ceased drying hops, was held not to be covered by the policy; otherwise, the words “while drying hops” would have no significance.³ If the policy excludes liability for damage from “burning of forests,” and provides that the risk shall be suspended during the existence of such contingency, proof that the fire happened while the neighboring forests were burning will release the insurers from liability.⁴ An agreement to cancel, if executed, is effectual without an erasure of the insured’s name from the books, although by the policy the insurance can only thus terminate.⁵ [A “risk of fire on shore for ten days prior to shipment” means that if the goods burn while on shore awaiting ship, and within ten days after the insurance is effected, the loss is covered by the policy.⁶ In an action against an insurance company on an open policy of insurance against fire and other marine risks, on provisions on vessels until landed, where it was in evidence that a part of the provisions had been landed when a fire broke out on shore, destroying them, it was held that the company was not liable for their loss.⁷ Where the policy did not state the period the risk was to cover, and a loss occurred fourteen days after its date, it was held to cover such loss, it being within a reasonable time.⁸]

¹ *Perry v. Prov. Ins. & Inv. Co.*, 99 Mass. 162.

² *Sherwood v. Agricultural Ins. Co.*, 73 N. Y. 447; *post*, § 401 *a*.

³ *Langworthy v. Oswego Ins. Co.*, Sup. Ct. (N. Y.) ; 11 Reprtr. 744.

⁴ *Commercial Un. Ass. Co. v. Canada Iron, &c. Co.*, 18 L. C. Jur. (Q. B.) 80. As to the effect of days of grace within which renewal premiums may be paid upon the prolongation of the original contract beyond its stated limits; see *ante*, § 354 *et seq.*; *Connell v. Scottish Commercial Ins. Co.*, 3 Ins. L. J. (Eng.) 536.

⁵ *Farmers’ Mut. Ins. Co. v. Wenger* (Pa.), 8 Ins. L. J. 712.

⁶ [*Fire Ins. Co. v. Merchants, &c. Trans. Co.*, 66 Md. 339.]

⁷ [*Mansur v. N. E. Mut. Mar. Ins. Co.*, 12 Gray, 520 at 527.]

⁸ [*Schroeder v. Trade Ins. Co.*, 109 Ill. 157.]

§ 401 *a*. Place is also material in the contract; and unless, under special exceptions, the removal of the subject-matter — as, for instance, a stock of goods — from the place where situated when insured leaves nothing to which the policy can attach at the time of the loss, though no doubt a recognition by the insurers of the validity of the policy after notice of removal will have the effect to protect the goods in their new place of deposit.¹ Sometimes, however, as we have seen, the nature of the property is such that the description of place is necessarily somewhat indefinite.² When there is doubt as to the place, as where the policy may apply to goods contained in one or several rooms or buildings, evidence is admissible to solve the doubt, aided by the principle that, if the description be by the insurer, the insured must have the benefit of the doubt.³ Where permission was given to remove to a new place, the policy was held to protect in the old place till removal.⁴ A policy on goods in a given story will cover goods removed from one room to another in the same story.⁵

Insurance on a stock of goods covers after-acquired and substituted goods in the same place to the amount of the original insurance, if the loss amounts to so much.⁶ So it covers loss by fire by spontaneous combustion of coals, and coals substituted, to the amount insured.⁷ So it covers stacks of wheat on a part of the farm purchased since the policy was

¹ *Harris v. Royal Can. Ins. Co.*, 53 Iowa, 236; *Williamsburg City Fire Ins. Co. v. Cary*, 83 Ill. 453; *Boynton v. Clinton, &c. Ins. Co.*, 16 Barb. (N. Y.) 254; *Lycoming Ins. Co. v. Updegraff*, 40 Pa. St. 311.

² *Ante*, § 219; *post*, § 420; *Eddy St. Foundry v. Farmers' Mut. Ins. Co.*, 5 R. I. 426.

³ *Beatty v. Lycoming Ins. Co.*, 52 Pa. St. 456; *post*, § 420; *Lycoming Ins. Co. v. Sailer*, 67 Pa. St. 108; *Bowman v. Agr. Ins. Co.*, 59 N. Y. 521; *Fair v. Manhattan Ins. Co.*, 112 Mass. 320; *Meadowcroft v. Standard Ins. Co.*, 61 Pa. St. 91; *Hews v. Atlas Ins. Co.*, 126 Mass. 389; *Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240.

⁴ *Kunze v. Am. Exchange Ins. Co.*, 41 N. Y. 412, affirming s. c. 2 Robt. (N. Y.) 443. *Contra*, *McClure v. Lancashire Ins. Co.*, 6 Ir. Jur. n. s. 63; s. c. 4 Ben. Fire Ins. Cas. 488.

⁵ *West v. Old Colony Ins. Co.*, 9 Allen (Mass.), 316.

⁶ *City Fire Ins. Co. v. Mark*, 45 Ill. 482; *Butler v. Standard Fire Ins. Co.*, 4 App. R. (U. C.) 391; *ante*, § 265; *Planters' Ins. Co. v. Engle*, 52 Md. 468.

⁷ *British Am. Ins. Co. v. Joseph*, 9 L. C. Rep. (Q. B.) 448.

issued, and even though the new purchase is not adjoining the other land.¹

[§ 401 B. *Place material.* — Where furniture is described as “contained in house number —” of a certain street, the description of locality is construed as a continuing warranty.² Goods described as being in a “store” are not covered by the policy, if in reality they are in a tavern, for that is a more hazardous location than the one described.³ Goods insured as “contained in his two-story frame dwelling-house,” are not covered when removed to the barn.⁴ Where the policy insured “household furniture contained in a house and additions occupied as a residence” and in another clause, “horse, buggies, &c., in barn,” the assured was not allowed to recover for a loss of the former by the burning of the barn, into which they had been removed on account of a previous fire in the house.⁵ A policy on a building and “sleighs, hacks, &c., contained therein” does not cover damage to one of the hacks while off for repairs in a shop one eighth of a mile away.⁶ Clothing, described as in a certain building, is not covered while removed during a long journey or protracted visit.⁷ Where a horse, harness, &c., insured as “personal farm property in buildings and on farm” were destroyed by fire while in the barn of a village hotel, the company was not liable.⁸ There was in this case another element, viz., that the hotel was within one hundred feet of other buildings, and the by-laws of the company placed such a risk beyond the limits of the policy.⁹]

¹ *Sawyer v. Dodge Co. Mut. Ins. Co.*, 37 Wis. 503, 508. See also *Mills v. Farmers' Ins. Co.*, 37 Iowa, 400, where the insurers were held liable for a horse purchased after the policy was issued, and killed while off the premises on his way to mill. But in *Providence, &c. R. R. Co. v. Yonkers Ins. Co.*, 10 R. I. 74, property situated on after-acquired property, though adjoining, was held not to be within the risk.

² [*Lyons v. Prov. Wash. Ins. Co.*, 14 R. I. 109, reversing 13 R. I. 347.]

³ [*Prudhomme v. Salamander Ins. Co.*, 27 La. An. 695 at 696.]

⁴ [*English v. Franklin Ins. Co.*, 55 Mich. 273-274.]

⁵ [*English v. Franklin Ins. Co.*, 21 N. W. Rep. 340 at 341.]

⁶ [*Bradbury v. Insurance Cos.*, 80 Me. 396.]

⁷ [*Towne v. Fire Ass. of Philadelphia*, 27 Brad. 433.]

⁸ [*Willey v. Farm Mut. Fire Ins. Co.*, 52 Mich. 446, 449.]

⁹ [*Ibid.* 449.]

[§ 401 C. *Company held though Property out of Place.* — A seal-skin dolman described as “contained in” a certain dwelling was held covered by the policy, although burned while at a furrier’s and under a greater risk than at home.¹ The nature and use of the property insured must be taken into account. In the case of furniture the designated location is an essential element, but in respect to things naturally moved about in their ordinary use it is otherwise. Many cases concerning animals, garments, vehicles, and machines are quoted in the Wisconsin case last cited. A policy on carriages &c., “contained in” a livery stable covers them while temporarily absent for repairs.² An insurance of a horse and other property “contained in a barn” is not a promissory warranty that the horse is to be kept in the barn all the time waiting for a fire or a stroke of lightning. A loss while in pasture on the farm is covered.³ An insurance of goods on board a ship to a certain port extends to the boat by which they are landed.⁴ A policy may always be so written as not to cover any goods except they be at a specified place, if sufficient care is taken to make the intent perfectly clear.⁵]

§ 402. **Risk; What it includes; Fire.** — Unless there be in the policy specific limitations, the risk extends to all losses by fire, death, or accident, or whatever cause of loss or injury be insured against, however they may be occasioned.⁶ [When a fire policy expressly excepts certain occasions of fire, all other occasions or causes of fire are included in the risk.⁷] ‘Of the force and effect of some of the exceptions and limitations, we have already treated.⁸ It has often been said that loss by fire means by actual ignition; and for this the early case of *Austin v. Drewe*⁹ is cited as an authority, which simply decides that

¹ [Noyes v. N. W. Nat. Ins. Co., 64 Wis. 415.]

² [Niagara Ins. Co. v. Elliott, 18 Ins. L. J. 628 (Va.) June 89.]

³ [Haws v. Fire Ass., 114 Pa. St. 431; De Graff v. Queen Ins. Co., 38 Minn. 501.]

⁴ [Pelly v. Royal Exch. Ass. Co., 1 Burr. 341 at 348.]

⁵ [First Nat. Bk. v. Lancashire Ins. Co., 62 Tex. 461, 464; Home Ins. Co. v. Baltimore Warehouse Co., 3 Otto, 527.]

⁶ *Ante*, §§ 174, 330, and *post*, § 420.

⁷ [Insurance Co. v. Transportation Co., 12 Wall, 194 at 197.]

⁸ *Ante*, ch. ix.

⁹ 6 Taunt. 436.

an insurance company is not liable, on a policy insuring against all damage by fire to the stock and utensils of a sugar-house, for damage done to the sugar by the heat of the usual fires employed for refining, the fires being unusually intense by reason of negligence in their management. And it has been suggested that the true ground of the decision was, that insurers do not undertake to be responsible for the excessive use of fire purposely used, whereby the article to which the fire is purposely applied is damaged, whether by heat or ignition; and that they would be no more liable in this case than they would where bread is overbaked or coffee is overroasted. At all events, if the case of *Austin v. Drewe* decides anything more than is above suggested, it has been denied to be good law by very high authority.¹ And it can scarcely be doubted that in certain cases injury done to a building and its contents by heat, as by scorching paint, cracking glass, and blistering pictures and furniture, or heating and thus destroying many articles of commerce, without actual ignition or visible burning, is within the risk; though it is no doubt true that where a chemist, artisan, or manufacturer employs fire in the processes of art and manufacture, and the article which is thus purposely subjected to the action of fire is damaged in

¹ Cushing, J., in *Scripture v. Lowell*, 10 Cush. (Mass.) 356. After a very able criticism of the case of *Austin v. Drewe*, Cushing, J., adds: "It has been thought proper thus to analyze the case of *Austin v. Drewe*, because, having been variously reported by four different reporters, and presenting itself prominently in several of the text-books, but in nearly all of them with more or less of misconception, it has become the starting-point, in legal construction, of conflicting lines of argument, leading to sundry false conclusions, and among others that of a supposed application to the present case." See also note of Judge Bennett, appended to the case in the first volume of his "Fire Insurance Cases," p. 104. Trumbull, J., *Case v. Hartford Ins. Co.*, 13 Ill. 676. Pardessus, *Cours de Droit Com.*, § 590, 2, puts the case thus: "If A.'s house is burned by an accidental fire, the heat whereof injures the goods of B., whose house, however, the fire does not reach, B.'s insurer is responsible, for the injury is indirectly caused by the peril insured against. But if A. kindles so great a fire in his furnace that the heat penetrates the partition wall between him and B., injuring B.'s goods, B.'s insurer is not liable, as the injury is not caused by the peril insured against." [Ignition is not necessary; all loss arising directly and immediately from that peril is covered, *Balestracci v. Firemen's Ins. Co.*, 34 La. Ann. 844; as the *fall* of buildings, scattering of acids, &c. *Transatlantic Fire Ins. Co. v. Dorsey*, 56 Md. 70.]

the process, — the fire not passing its ordinary limits, — such damage is not within the loss covered by the policy.¹ In *Sohier v. Norwich Fire Insurance Company*,² which was a case where the fire, originating from without a theatre, heated its walls to such a degree as to cause it to take fire within, the insurers were held liable. The policy, however, provided that they should be exempt from loss for fire originating in the theatre, and the real question was, whether the fire in this case originated in the theatre; and it was held that it did not. In *Brown v. King's County Fire Insurance Company*,³ a druggist was warming upon his stove an inflammable ointment, as he was wont to do, which took fire and communicated with the building; and it was held that this was a loss covered by the policy. [A policy insuring an employer against loss by his *statute* liability for employees does not cover damages obtained from him at common law.⁴ Parol evidence of an agreement at the time of insurance that a contract insuring generally against river perils was not intended to cover ice, is not admissible.⁵ Sometimes buildings are insured against *wind*,⁶ or crops against hail.⁷ Where a policy on a ship excepted liability for capture, and when a storm arose so that a portion of the cargo was thrown overboard to save the crew, and later the ship ran into a foreign port for safety, and there fell into the hands of enemies, it was held that the company was liable for the goods thrown overboard, but not for the rest. The

¹ *Ibid.*; *Beaumont, Ins.* 37.

² 11 Allen (Mass.), 336.

³ 31 How. (N. Y.) 508.

⁴ [*Morrison v. Scot. Employees Life & Acc. Ass. Co. (Lim.)*, 26 Scot. L. R. 151.]

⁵ [*State Fire & Mar. Ins. Co. v. Porter*, 3 Grant's Cas. 123 at 124. JJ. Woodward and Strong dissented on the ground that the contract was not clear, and parol evidence to explain its meaning should have been received, and this certainly seems the fairer, sounder view of the facts of the case. The plaintiff was distinctly told at the time of insurance that the contract did not cover ice, and evidence should be received to show the manner in which the parties understood the words of the policy in such a case.]

⁶ [*Sexton v. Hawkeye Ins. Co.* 69 Iowa, 99. The effects of a storm on neighboring property is competent to show that it was a "tornado." *Poggensee v. Mut. Fire, Lightning & Tornado Ins. Co.*, 69 Iowa, 157.]

⁷ [*Mut. Hail Ins. Co. v. Wilde*, 8 Neb. 427.]

proximate cause of loss in every case must be looked to.¹ If a policy is made expressly to cover "all risks contained in regular policies of insurance," loss by capture is covered, and no parol evidence is admissible to show that the parties only intended sea-risks.² Insurance of a ship for a voyage, "Cochin, Alipee, and New York," does not cover the vessel if she sails on "Cochin, Colombo, Alipee, New York." That is a different voyage.³

§ 403. **Risk ; "Usurped power;" "Civil Commotion;" "Mobs or Riots."** **Proximate Cause.**—Destruction by fire set by an ordinary mob is not destruction by "usurped power." "Usurped power" would seem to mean that of an armed invasion or rebellion, when armies are on foot in their support. And perhaps there is a distinction between an ordinary mob or bread riot, and a rebellious mob or one having political purposes. The one would be treasonable, and might be properly said to usurp power, while the other would be only criminal. A riot to reduce the price of bread is no usurpation of power to do it, because government itself has no such power.⁴ Nor is a destruction of the property by order of the municipal authorities to stay a conflagration a destruction caused by "usurped power," even though it be done illegally. It is only a destruction by those usurping the power of government that is excluded by such a provision.⁵ "Usurped power" is "rebellion conducted by authority" "got to such a head as to be under some authority."⁶ And fire occasioned by the burning of a bridge, lawfully ordered by the military authorities, to prevent the advance of a hostile armed force, regularly organized, is not a loss "occa-

¹ [Rice v. Homer, 12 Mass. 230 at 237.]

² [Levy v. Merrill, 4 Me. 181 at 186.]

³ [Dickie v. Merchants' Mut. Ins. Co., 4 Russ. and Geld. (Nova Sco.) 244.]

⁴ Wilmot, C. J., in Drinkwater v. Lon. Ass. Co., 2 Wilson, 363.

⁵ City Fire Ins. Co. v. Corlies, 21 Wend. 367 ; Pentz v. Ætna Ins. Co., 9 Paige, Ch. (N. Y.) 568 ; Field v. City of Des Moines, 39 Iowa, 575. The first fire is the proximate cause. The exception from risk of losses occasioned by the explosion of gunpowder applies only to cases of fire originating with the explosion. Greenwald v. Insurance Co., 3 Phila. 323.

⁶ Per Lord Mansfield, Langdale v. Mason, 2 Marsh. Ins. 792.

sioned by mobs or riots.”¹ In *Barton v. Home Insurance Company*,² during the late rebellion, the national soldiers were overpowered and compelled to surrender to an armed and organized force of rebels, by whom the property was burned; but there was no evidence that the destruction was authorized by an order from the commanding officers. After referring to the English cases, and to the fact that the case at bar was one of novel impression in this country, the court, in giving judgment for the defendant, proceeds:—

“It would be doing violence to the language which the parties have seen fit to use, and would be also a strained and unnatural interpretation of their meaning, to say that the insurer would be liable in all cases, except when he could show that the burning took place by order of the officer immediately commanding the rebellious forces. The language of the proviso is, that the company shall not be liable for any loss or damage by fire which may happen by means of invasion, military or usurped power, &c. If the military or usurped power, or the invasion, was the means that occasioned, or the proximate cause of, the loss, then the company cannot be held liable within the terms of the contract. An army of invasion, or engaged in rebellion, is liable to commit acts of spoliation or burning without any direct commands from the superior officers, and the insurer certainly never intended to incur a risk by reason of such acts. To exonerate the defendant from its liability, it is not material how, or in what way, the fire originated, provided it was within the range of any one or more of the excepted causes. The real question is, did the fire happen or the loss occur by reason of, or in consequence of, the military and usurped power of the rebels? . . . and were they the proximate cause of the burning and destruction of the property?” So where the property was ordered to be burned by a Union officer to prevent its falling into the hands of his Confederate assailants, the burning was held to be within the exception.³ The doctrine of this case is, however, ques-

¹ *Harris v. York Mut. Ins. Co.*, 50 Pa. St. 341.

² 42 Mo 156.

³ *Ætna Ins. Co. v. Boon*, 95 U. S. 117, reversing s. c. 40 Conn. 575.

tioned on the propriety of the application of the rule *proxima causa*, &c., in a later case in Virginia, where it is held that the real and proximate cause of the fire was the unnecessary action of the Union forces, and not the unlawful invasion of the Confederate forces. The invasion had not rendered the burning necessary, and therefore had not caused it,—a rule which certainly opens up a field of inquiry bristling with great if not insuperable difficulties.¹

Civil commotion seems to be something less than usurped power, and something more than a mob or riot. It is an insurrection of the people, setting the authority of the government at defiance, venting its fury upon all who are obnoxious, and seeking general confusion and destruction, and, perhaps, with a view to prevent the enforcing of certain particular laws. The anti-Roman Catholic riots of London in 1780, which grew out of hostility to the laws granting certain privileges to the Catholics, and were long-continued and violent and tumultuous, amounted to a “civil commotion” within the meaning of a policy exempting the insurers from loss in case of “civil commotion.” This “is not an occasional riot,” said Lord Mansfield to the jury in that case; “that would be another question. I do not give any opinion what that might be. . . . I think a civil commotion is this,—an insurrection of the people for general purposes, though it may not amount to a rebellion where there is a usurped power.”² If the insurer be liable for loss occasioned by a riot, the fact of the riot need not first be established by a criminal prosecution, nor is it material that the riotous assemblage was originally gathered for a lawful purpose.³ In this case there seems to have been an affray, succeeded by a riot; that is, said the court, “a tumultuous disturbance of the peace by three persons or more;” and the fact that it was preceded by an affray did not make it the less a riot. In *Spruil v. North Carolina Mutual Life Insurance Company*,⁴ a runaway slave, whose life was

¹ *Portsmouth Ins. Co. v. Reynolds*, 32 Grat. 613.

² *Langdale v. Mason*, 2 Marsh. Ins. 792.

³ *Dupin v. Mut. Ins. Co.*, 5 La. Ann. 482.

⁴ 1 Jones (N. C.), 126.

insured, was shot while resisting the lawfully appointed patrol who were pursuing him; and upon the question whether his death was "by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped authority, or by the hands of justice," the court defined an insurrection to be "a seditious rising against the government; a rebellion; a revolt;" and a riot to be "where three or more persons actually do an unlawful act, either with or without a common cause, . . . the intention with which the parties assemble, or at least act, being unlawful," — in the latter respect differing from the judgment of the Supreme Court of Louisiana, as stated above. In the same case a commotion was said to be "a tumult; and a tumult to be a promiscuous commotion in a multitude, an irregular violence, a wild commotion. A civil commotion, therefore, requires the wild or irregular action of many persons assembled together." And to die by the hands of justice was said to be "to die by some general sentence for the commission of some felony." As the slave met his death in resistance to lawful authority, the loss was held not to be within any of the exceptions. [A loss caused by a party of men firing shots, driving away the watchman, and setting fire to the premises is a loss by "riot."¹ A clause exempting the company in case of fire resulting from riot or other "notorious resistance to authority," construed in connection with the preceding clause relieving the company in case of fire caused by invasion, foreign enemy, insurrection, civil commotion, lawful military power, or usurped power, does not free the company where the fire was caused by five convicts, who conspired to escape from prison and who yielded immediately on coming in contact with an officer.²]

§ 404. **Risk; Injury by Water and Removal; Theft.** — Damage resulting from *bona fide* efforts to save the property from the fire, as by water,³ and breakage by removal, and by loss or

¹ [Lycoming Fire Ins. Co. v. Schwenk, 95 Pa. St. 89, 96.]

² [Strauss v. Imperial Fire Ins. Co., 94 Mo. 182.]

³ [Goods, in the lower story of a house which was on fire, were damaged by water, and it was held that the insurers were liable on a policy against fire. Geisek v. Crescent Mut. Ins. Co., 19 La. Ann. 297. The goods would have burned if the water had not put out the fire.]

theft consequent upon exposure occasioned by the fire, are within the loss covered by a policy against damage by fire.¹ The theft must be one of the consequences of the fire or removal, and if so, the time of the theft, whether at the time of the fire or afterwards, is immaterial.² But if loss by theft be expressly excluded, there can be no recovery, even though by the terms of the policy the company is not to be liable at all for loss unless the insured "use all due diligence in removal and preservation of the property."³ The exclusion must be unequivocal. And doubt will be resolved against the insurer.⁴ And the removal should be fairly and reasonably necessary, and not as the result of an unreasonable and unfounded apprehension, as when fire is at a considerable distance. And in one case it has been held that damages from removal, where there was a reasonable apprehension of danger, and where the fire was already burning the fourth building distant in the same block, were not recoverable.⁵ But the better doctrine no doubt is, that whether the removal be necessary or not depends upon the circumstances of the case;⁶ and that if the removal be under such circumstances that had it not taken place the insured would have been guilty of negligence, he may recover, while he cannot recover if the goods are wantonly or unnecessarily removed, or perhaps if prudence did not require them to be removed.⁷ And this is true although

¹ *Whitehurst v. Fayetteville Mut. Ins. Co.*, 6 Jones (N. C.), 352; *White v. Republic Fire Ins. Co.*, 57 Me. 91; *Stanley v. Western Ins. Co.*, 3 L. R. (Exch. Cases) 71; *Thompson v. Montreal Ins. Co.*, 6 U. C. (Q. B.) 319; *Lewis v. Springfield Fire & Mar. Ins. Co.*, 10 Gray (Mass.), 159; *Tilton v. Hamilton Fire Ins. Co.*, 1 Bosw. (Superior Ct. of N. Y.) 367; *Independent Mut. Ins. Co. v. Agnew*, 34 Pa. St. 96; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Talamon v. Home Ins. Co.*, 16 La. Ann. 426; *Agnew v. Insurance Co.*, 3 Phila. 193.

² *Newmark v. Lon. & Liv. Fire & Life Ins. Co.*, 30 Mo. 160.

³ *Fernandez v. Merchants' Mut. Ins. Co.*, 17 La. Ann. 131; *Webb v. Prot. Ins. Co.*, 14 Mo. 3.

⁴ *Lieber v. London, &c. Ins. Co.*, 6 Bush (Ky.), 639.

⁵ *Hillier v. Alleghany County Ins. Co.*, 3 Barr (Pa.), 470.

⁶ [Whether the removal of goods was necessary, must be judged not by the result but by the circumstances as they appeared at the time of removal. *Bales-tracci v. Firemen's Ins. Co.*, 34 La. Ann. 844.]

⁷ *Case v. Hartford Ins. Co.*, 13 Ill. 676; *Brady v. N. W. Ins. Co.*, 11 Mich. 425.

the policy insures while the property "shall be and remain" in the building.¹ [A policy excepted liability for a plate-glass window if broken by fire or during removal. A fire occurred next door; the assured removed his stock in part, in anticipation of loss; while so doing a mob broke the window for the purpose of plunder, and it was held that the company was liable.²]

§ 405. **Risk ; Smoking ; Illegal Practices.** — If smoking be prohibited, or declared to be not allowed, a prohibition by the insured, with abstinence on his own part, and reasonable and proper precautions against it on the part of others, is a compliance with the requirement.³ And the policy covers goods illegally kept for sale, the insurance not being upon the business or mode of sale, but upon the property itself.⁴ [Under a warranty *against seizure on account of illicit trade*, the underwriters are liable for a loss by illicit trade, barratrously carried on by the master.⁵]

§ 406. **Risk ; Lightning.** — Loss by ignition resulting from lightning is covered by a policy insuring against danger by fire, or by fire from lightning. But loss by being torn to pieces by lightning without combustion, is not.⁶ Insurance against loss by fire resulting from lightning is one thing, and insurance against loss by lightning is quite another;⁷ and a company authorized to insure against the former is not thereby authorized to insure against the latter.⁸ [When a policy expressly provided that the insurer should be liable for all loss or damage caused by lightning, it was held that this language covers all the known effects of lightning, and not merely those arising from combustion.⁹ The policy was held to cover a

¹ Holtzman v. Franklin Ins. Co., 4 Cranch, C. Ct. 295.

² [Marsden v. City & County Ins. Co., 1 L. R. C. P. 232 at 239.]

³ Ins. Co. of North America v. McDowell, 50 Ill. 121; Aurora Fire Ins. Co. v. Eddy, 55 id. 222.

⁴ Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124. And see *ante*, § 246.

⁵ [Luckley v. Delafield, 2 Caines (N. Y.), 221 at 223.]

⁶ Babcock v. Montgomery County Mut. Ins. Co., 6 Barb. (N. Y.) 637; s. c. affirmed, 4 Comst. (N. Y.) 326; Kenniston v. Merrimack County Mut. Ins. Co., 14 N. H. 341.

⁷ Ibid.

⁸ Andrews v. Union Mut. Ins. Co., 37 Me. 256.

⁹ [Spenseley v. Lancashire Ins. Co., 54 Wis. 433 at 441.]

loss by a tornado in which there was electrical disturbance operating as an efficient cause in the destruction.]

§ 407. **Risk; Misconduct; Fraud; Wilful Destruction of Property insured; Suicide.** — Loss by *misconduct* is not covered by the policy, as where one sets fire to a steamboat by throwing on combustibles, brought to an improper place in contravention of law, and for the purpose of getting up a great head of steam while the steamboat is racing with another boat.¹ Nor is loss by fraud, wilful burning, voluntary suicide, or other wilful destruction of the subject-matter of insurance, whereby the event insured against is brought about. [If a horse dies by reason of the cruel beating and abuse of his master, the latter can recover no insurance.²] No one can lay the foundation of a claim for insurance in his own reckless or wilful wrong; but fraud cannot be predicated upon acts which may lawfully be done; or left undone, no matter what may be the motive.³ [It is error to charge that the insured must show that the loss was an honest one, and not traceable to himself.⁴ If wilful destruction is justifiable, the property being in certain peril of a worse kind, it is not fatal. When a captain burns a vessel to prevent her falling into an enemy's hands, the company is liable on a fire policy.⁵]

[§ 407 A. **Wrongful Act of Third Person or Act of Assured while Insane.** — When the assured represented that a counting-room was warmed with coal by one stove, and that the funnel and stove were well secured, this does not make it necessary that they should be so kept when not in use.⁶ And when the assured admitted shipwrecked sailors into the insured premises for one night, but ordered that no fire should be built in the said stove, which was not then well secured, but

¹ *Citizens' Ins. Co. v. Marsh*, 41 Pa. St. 387. See *post*, § 411, for distinction between misconduct and negligence.

² [*Western Ins. Co. v. O'Neill*, 21 Neb. 548. Good. The wretch in this particular case ought to have been put in States prison.]

³ *Franklin Ins. Co. v. Humphrey*, 65 Ind. 549.

⁴ [*Dwyer v. Continental Ins. Co.*, 57 Tex. 181. The burden is on the company.]

⁵ [*Gordon v. Rimmington*, 1 Camp. 123 at 124.]

⁶ [*Loud v. Citizens' Mut. Ins. Co.*, 2 Gray, 221 at 223.]

fire was built without the assured's knowledge or consent, the policy was held good, and covering the loss thereby resulting. When insurance was effected by the *owner* of a vessel after loss of the same but in entire good faith, and where it appeared that the *master* of the vessel had fraudulently refrained from communicating the loss for the avowed purpose of giving the owner time to insure without knowledge of the loss, it was held that the owner could recover, and was not affected by the conduct of the master.¹ Neglect by a sea captain to register goods before leaving the docks, as required by law, does not avoid a policy thereon.² If a policy excepts loss from incendiarism, it will not cover a loss occasioned by the firing of the adjoining house by a stranger for whose acts the insured was in no way responsible.³ It seems that a felonious burning by the wife of the assured is covered by the policy.⁴ The wife's insurance is not avoided by her husband's burning the property without her knowledge or complicity.⁵ In the absence of express agreement, the company is not relieved because the fire was caused by the assured while insane.⁶]

§ 408. **Risk ; Negligence.** — Mere carelessness and negligence, however great in degree, of the insured, or his tenants or servants, not amounting to fraud, though the direct cause of the fire, are covered by the policy.⁷ Indeed, one of the principal objects of insurance against fire is to guard against

¹ [General Interest Ins. Co. v. Ruggles, 12 Wheat. (U. S.) 408 at 411.]

² [Carruthers v. Gray, 3 Camp. 142 at 143.]

³ [Walker v. Lond. & Prov. Ins. Co., Ir. L. R. 22 Ex. 572.]

⁴ [Midland Ins. Co. v. Smith, 6 Q. B. D. 561.]

⁵ [Perry v. Mechanics' Mut. Ins. Co., 11 Ins. L. J. 390. 1st Cir. (R. I.).]

⁶ [Karow v. Continental Ins. Co., 57 Wis. 56.]

⁷ [In the absence of express stipulation the fact that the loss might have been avoided by care on the part of the insured or his agent will not relieve the insurer. Enterprise Ins. Co. v. Parisot, 35 Ohio St. 35; Perrin v. Protection Ins. Co., 11 Ohio, 147 at 171. Unless it amounts to fraud or wilfulness. Phenix Ins. Co. v. Sullivan, 39 Kans. 449; Columbia Ins. Co. v. Lawrence, 10 Pet. 507 at 517. And, of course, if the proximate cause of loss is one of the perils insured against, negligence of the insured as a remote cause will not relieve the company unless it amounts to fraud, Lebanon Mut. Ins. Co. v. Kepler, 106 Pa. St. 28; even though the policy excepts injuries caused by negligence. Greenwich Ins. Co. v. Raab, 11 Brad. 636.]

the negligence of servants and others; and, therefore, while it may be said generally that no one can recover compensation for an injury which is the result of his own negligence or want of care, the contract of insurance is excepted out of the general rule. Nor does it make any difference whether the negligence is that of the insured himself or of others. The law looks only at the proximate cause of the loss.¹ But negligence in a matter as to which the insurers expressly stipulate that they will not assume the risk — as where ashes are placed by a boy in wooden vessels, the insurers stipulating that they will not assume the risk if ashes are allowed to remain in wood, although the fact was unknown to the insured, and was done without orders and contrary to the usual practice — will work a forfeiture.² Whether the fire is the result of negligence is of course a question of fact for the jury, if the facts from which it is to be inferred are in dispute, and is so much a question of circumstances that so trifling a fact as dry weather, and the direction and strength of the wind, are to be taken into account in determining whether a fire, occurring by

¹ *Cumberland Valley Mut. Prop. Co. v. Douglas*, 58 Pa. St. 419; *Shaw v. Robberds et al.*, 6 Ad. & El. 75; *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner (U. S. C. Ct.), 434; *Sanford v. Mechanics' Mut. Fire Ins. Co.*, 12 Cush. (Mass.) 541; *Daniels v. Hudson River Fire Ins. Co.*, id. 416; *Mickey v. Burlington Ins. Co.*, Sup. Ct. (Iowa), 2 Ins. L. J. 15; *Austin v. Drewe*, 6 Taunt. 436; s. c. 4 Campbell (N. P.), 561; *Maryland Fire Ins. Co. v. Whitford*, 2 Law Transcript, 284, (1869); *Columbia Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507; *Gates v. Madison County Mut. Ins. Co.*, 1 Seld. (N. Y.) 469; *Williams v. New England Mut. Fire Ins. Co.*, 31 Me. 219; *Johnson v. Berkshire Mut. Fire Ins. Co.*, 4 Allen (Mass.), 388; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. (U. S.) 213; *Grove v. Farmers' Mut. Fire Ins. Co.*, 48 N. H. 41; *National Ins. Co. v. Webster*, 83 Ill. 470; *Germania Ins. Co. v. Sherlock*, 25 Ohio St. 33; *Jameson v. Royal Ins. Co.*, Ir. Rep. 7 C. L. 126. [The underwriter cannot set up the negligence of the servants of the assured as a defence. *Mueller v. Putnam*, 45 Mo. 84 at 88; *Insurance Co. v. Sherwood*, 14 How. 351 at 364; *Kansas Ins. Co. v. Berry*, 8 Kans. 159 at 168; *Dixon v. Sadler*, 5 M. & W. 405 at 414; *Sperry v. Del. Ins. Co.*, 2 Wash. C. C. 243 at 252; *Arctic Ins. Co. v. Austin*, 6 T. & C. (N. Y.) 63 at 70; *Phoenix Ins. Co. v. Cochran*, 51 Pa. St. 143 at 148. Unless it be wilful or so gross as to amount to fraud. *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230 at 235. Want of ordinary care on the part of the assured prevents recovery. *Young v. Washington Ins. Co.*, 14 Barb. 545 at 547 (mere dictum).]

² *City of Worcester v. Worcester Mut. Fire Ins. Co.*, 9 Gray (Mass.), 27.

the dropping of coals upon the track, and thence communicating through the dry grass to the plaintiff's farm and land, is due to the negligence of a railway company.¹ And if the policy requires the insured, upon the occurrence of a fire, to use all reasonable means for the "protection" of the property, this means that he shall take the requisite steps to prevent its further deterioration; but it does not require him to repair or restore to the original condition.²

§ 409. **Risk ; Negligence ; Wilful Exposure.** — Where an accident policy forbids "wilful exposure," negligence is no defence.³ So where the policy provides liability for "wilful and wanton exposure."⁴ But in *Morel v. Mississippi Valley Life Insurance Company*,⁵ where the policy said nothing about negligence, it was held that the insured, having "inadvertently" put his elbow out of the window of a railway carriage, whereby he contributed to the accident, could not recover, — a decision which is not only unsupported by the citation of any case, but is counter to the almost universal current of the authorities.⁶ And no case in life insurance has been found where negligence of usual precautions in the preservation of health, or even the utmost carelessness and recklessness relative thereto, have been made a ground of defence. Yet no doubt many cases of death have occurred attributable to such negligence as the cause.⁷

[§ 409 A. **Exposure to Obvious and Unnecessary Danger.** — If one voluntarily and unnecessarily places himself in a position of obvious danger, and the precise injury happens to him which there is reason to fear, as if one runs along a railroad track in the night to catch a train on a parallel track and is run over, his act is within the clauses against exposure to

¹ *Webb v. R. W. & O. R. R. Co.*, 49 N. Y. 420.

² *Hoffman v. Ætna Fire Ins. Co.*, 1 Robt. (Superior Ct. N. Y.) 501; s. c. affirmed, 32 N. Y. 405.

³ *Prov. Life Ins. & Inv. Co. v. Martin*, 32 Md. 310.

⁴ *Shneider v. Prov. Life Ins. Co.*, 24 Wis. 28.

⁵ 4 Bush (Ky.), 535.

⁶ And see *post*, chapter on Accident Insurance.

⁷ As to what would be the rule where there are several apparent causes, of which negligence may be one, see *ante*, § 301, and *post*, § 530.

“obvious and unnecessary danger,” and requiring due diligence for personal safety, and the policy is void.¹ Crossing a railroad track in broad daylight in front of an approaching train, there being no obstruction to prevent sight, nor any evidence of short sight or deafness, is within an exception against exposure to obvious risk, and the company is not liable. If the insured had been paying reasonable attention to what he was doing the risk would have been obvious to him.² But one who voluntarily goes to the rescue of a ship’s crew in a strong sea, does not expose himself to “unnecessary” danger. Although the insured was a farmer it was his duty as a man to go to the rescue of the crew of a ship driven ashore near his farm.³

§ 410. **Risk ; Gross Negligence ; Design.** — Gross negligence of workmen in making repairs, it was said, in *Jolly v. Baltimore Equitable Society*,⁴ will avoid the policy. But there was nothing in the case that required any decision upon that point, and it is not probable that anything short of such negligence as raises a presumption of bad faith, amounting to fraud or design, was intended. This, by all the authorities, avoids a policy, as no man can be allowed in a court of justice to profit by his own wrong, or to avail himself of his own turpitude as a ground of recovery in a suit.⁵ But losses by “gross negligence” and “design” are sometimes expressly excepted as grounds of liability. The first term, as used in a condition exempting from loss on that account, it has been said, “is the want of that diligence which even careless men (*dissoluti homines*) are wont to exercise.”⁶ ‘For he who is only less diligent than very careful men cannot be said to be more than slightly inattentive ; he who omits ordinary care

¹ [Tuttle v. Travelers’ Ins. Co., 134 Mass. 175.]

² [Cornish v. Acc. Ins. Co., C. A. 23 Q. B. D. 453.]

³ [Tucker v. Mut. Ben. L. Co., 50 Hun, 50.]

⁴ 1 Harr. & Gill, 295.

⁵ *Henderson v. Western Mar. & Fire Ins. Co.*, 10 Rob. (La.) 164; *Huckins v. People’s Mut. Ins. Co.*, 11 Fost. (N. H.) 238; *Robinson v. Mercer County Mut. Fire Ins. Co.*, 3 Dutch. (N. J.) 134; *Western Farmers’ Ins. Co. v. Miller*, 1 Handy (Cincinnati Superior Ct.), 325. And see also authorities cited in the preceding section.

⁶ Hein. El. Jur. lib. 3, tit. 14, § 787.

is a little more negligent than men ordinarily are ; and he who omits even slight diligence fails in the lowest degree of prudence, and is grossly negligent.'"¹ Loss by mere negligence is not loss "by design," which imports plan, scheme, and intention.² [Gross negligence may be evidence of fraud, but is not of itself *mala fides*.³]

§ 411. **Risk ; Negligence amounting to Misconduct.** — But negligence which amounts to misconduct is not insured against. Misconduct is defined to be a transgression of some established and definite rule of action, where no discretion is left except what necessity may demand, as contradistinguished from negligence, carelessness, and unskilfulness, which are transgressions of some established but indefinite rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law ; carelessness, an abuse of discretion under an indefinite law. Misconduct is a forbidden act ; carelessness, a forbidden quality of an act, and is necessarily indefinite. Thus where the captain of a steamer, in running a race with another steamer, and for the purpose of making more steam, brings from the hold of the vessel a barrel of turpentine, knocks the head out, and places it so near the furnace that the fire is communicated to the wood upon which the turpentine is thrown, and thence to the barrel, such manner of use of turpentine being in contravention of an act of Congress, as matter of law, this is misconduct, and avoids the policy.⁴ In *Chandler v. Worcester Insurance Company*,⁵ Shaw, C. J., puts the case of a party insured standing by the fire, which was yet so trifling that by throwing on a cup of water, which was at hand, the fire might be extinguished, as a case of misconduct which would avoid a

¹ *Campbell v. Monmouth Mut. Fire Ins. Co.*, 59 Me. 430. There is a growing tendency amongst the courts to deny that there is any legal distinction between negligence and "gross" negligence. *New York Cent. R. R. v. Lockwood*, 17 Wall. (U. S.) 357.

² *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner (U. S. C. Ct.), 434.

³ [*Goodman v. Harvey*, 4 Ad. & El. 870 at 876.]

⁴ *Lowrie, C. J.*, in *Citizens' Ins. Co. v. Marsh*, 41 Pa. St. 387, overruling s. c. 2 Pittsburgh Rep. (Crumrine) 273 ; *Levi v. N. O. Ins. Ass.*, 2 Wood (U. S. C. Ct.) 63.

⁵ 3 Cush. (Mass.) 328.

policy. The difference between this and designed destruction, by actually setting fire, is certainly hardly appreciable as affecting the intent of the insured, though ostensibly in one case there is a positive act, while in the other there is no action at all. But it should appear that by proper effort there is reasonable cause to believe the fire may be extinguished.¹ [If the element of wilfulness comes in we have, not mere negligence but misconduct. Irrespective of conditions to that effect, the insured ought not to refrain from using means within his power to prevent loss, or to hinder others from saving the property.²]

[§ 411 A. In **Marine Insurance** if the damage might have been avoided by the use of ordinary care, the insurers are not liable.³ Negligence of seamen causing an accidental fire is a good defence to an action on a policy. Insurers are not responsible for negligence of the master and crew not amounting to barratry, *i. e.* knavery or fraud.⁴ When a ship was negligently loaded at a foreign port, thereby injuring her, and thereafter in a storm was lost, the insurers were held liable although the negligent loading rendered her less seaworthy than otherwise she would have been.⁵ Where the loss to a vessel is immediately caused by a peril insured against, it is immaterial that the peril was brought about by the crew,—agents of the assured. In the absence of fraud only the proximate cause is looked at.⁶ But where a vessel is injured by a peril insured against, and further damages arise from neglect of the master or his servants to repair or transship, &c., the company is not liable for these further damages. When a policy insures against loss by thieves or barratry of

¹ *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Kellogg v. Ch. & N. W. R. R. Co.*, 26 Wis. 223, 257. See also *Toledo, Peoria, & Wabash R. R. Co. v. Pindar*, 53 Ill. 447.

² [*Devlin v. Queen Ins. Co.*, 46 U. C. R. 111.]

³ [*The Titania*, 19 Fed. Rep. 101 S. Dist. of New York, 1883. If the insured himself is negligent, he ought not to recover; if only an agent, he ought.]

⁴ [*Grim v. Phoenix Ins. Co.*, 13 Johns. 451 at 458; *Fayerweather v. Phenix Ins. Co.*, 54 N. Y. Super. 545; *Pipon v. Cope*, 1 Camp. 434 at 436 (marine policy).]

⁵ [*Redman v. Wilson*, 14 M. & W. 476 at 483.]

⁶ [*Mathews v. Howard Ins. Co.*, 11 N. Y. 9 at 16.]

master or crew, the insured makes a *prima facie* case for recovery on showing a theft without showing that it was committed by assailing thieves; the theft may have been by the crew. So with *barratry*, which covers all knavery, fraud, cheating, or breach of trust of the master or crew; the assured is entitled to recover for a loss by theft, without showing due care on the part of the master. It is said that if the negligence of the master not amounting to fraud, gave opportunity to the crew to steal, the company would not be responsible; but such facts must be shown by the company.^{1]}

§ 412. **Risk ; Fire occasioned by falling of Walls ; Proximate Cause.** — Where a fire had happened, and the day after it was extinguished the walls of the burnt edifice, in consequence of being weakened by the fire, fell upon another building, crushing it in, the latter injury was held to be covered by a policy against damage by fire. The fire is in such case the proximate cause, though not the actual instrument of the destruction, just as where furniture is injured by water used to quench the fire, or a mirror is broken by the falling of materials loosened by the flames, in which cases it would hardly be contended that the loss was not by fire. The Lord President thought that if the gable had fallen during the fire and caused the destruction, it would not have been doubted that the loss was covered by the policy, and he could not see that the interval which actually elapsed could make any difference in the principle. The cause of the loss was in either case the same.² But where seven days elapsed between the fall and the fire, and the fall occurred during a gale of wind, it was held the loss was not insured.³ Where, however, the walls of a warehouse, from weakness or other cause not proceeding from fire, and without its agency, fell in upon themselves, becoming, with the goods contained therein, one mass of ruin, out of which fire proceeded, it was held that this was not a loss by fire. When the fire took place the subject insured

¹ [American Insurance v. Bryan, 26 Wend. 563; a splendidly-reasoned case.]

² Johnston v. West of Scotland Ins. Co., 7 Ct. of Sess. Cas. (Scotch) 52.

³ Gaskarth v. Law Union Ins. Co. (Eng.), 6 Ins. L. J. 159.

had ceased to be, and had become a congeries of materials. The cause of the loss was the fall, and not the fire. The fire did not produce the fall, but the fall produced the fire, and the destruction was by the former. That a fire sprung up after the fall in the rubbish and consumed the fallen materials was immaterial. The heap of rubbish was not insured. The building alone was insured, and that at the time of the fire had ceased to be, and that too by reason of a peril not insured against. The fire in this case was not the efficient or proximate cause of the loss.¹ A building still standing upon its supporting posts, though out of plumb and practically abandoned as unfit for occupancy, cannot be said to have fallen.² Otherwise, if substantially all the floors and roof have fallen in, leaving only the walls standing.³ And where one building became undermined and fell, covering in its ruins certain chemicals which took fire, which fire communicated with another building, a part of which, with the goods therein, had been involved in the crash, but a part also had remained standing with the goods undisturbed, an action to recover for damage by fire to the goods so remaining undisturbed was sustained.⁴ It was contended by the defendants in this case that after the fall of part of the building the goods could no longer be said to be "contained therein," within the meaning of the policy. But the court thought they were certainly as much contained in the building and covered by the policy as if they had been moved out to avoid the fire, but nevertheless had been consumed.

§ 413. **Risk ; Spontaneous Combustion ; Explosion ; Ignition ; Proximate Cause.** — There can be no doubt that fire

¹ *Nave v. Home Mut. Ins. Co.*, 37 Mo. 429.

² *Firemen's, &c. Ins. Co. v. Congregation, &c.*, 80 Ill. 558.

³ *Huck v. Globe Ins. Co.*, 127 Mass. 306. See also *Breuner v. Liverpool, &c. Ins. Co.*, 51 Cal. 101.

⁴ *Lewis v. Springfield Fire & Mar. Ins. Co.*, 10 Gray (Mass.), 159. In *Dows v. Insurance Co.*, 127 Mass. 346, it was held by a divided court that the provision, "If a building shall fall, except as the result of a fire, all insurance shall cease," applied rather to a case where the building falls by inherent defects, or by being undermined, or prostrated by a storm, than to a case where, by a sudden combustion of inflammable gas, an explosion takes place, by the force of which the building is made a heap of ruins.

originating in spontaneous combustion is within the risk against fire.¹ The subject of loss by explosion has given rise to much elaborate and learned discussion, and recently to decided differences of opinion, presented on both sides with marked ability, which we shall now proceed to state. The burning of a steamboat by fire caused by the accidental explosion of gunpowder on board was early held to be "loss or damage by fire," since the explosion was caused by fire.² And following this case it was held that, where a building was purposely blown up by gunpowder to stay the ravages of a conflagration, and crockery ware stored therein, the crates themselves having been burned after the explosion, was thus destroyed, fire was the proximate cause of the loss.³ And this has been held to be so although the policy excepted loss by the explosion of gunpowder, this exception being held to apply only to fire originating in the explosion of gunpowder.⁴ Subsequently, in *Scripture v. Lowell Mutual Fire Insurance Company*,⁵ where, upon the fact that a cask of gun-

¹ *Brit. Am. Ins. Co. v. Joseph*, 9 L. C. (Q. B.) 448. [It is held, however, that an ordinary marine policy does not cover spontaneous combustion, resulting from the inherent infirmity of the goods insured. *Providence W. Ins. Co. v. Adler*, 65 Md. 162.]

² *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. (U. S.) 213.

³ *City Fire Ins. Co. v. Corlies*, 21 Wend. (N. Y.) 367.

⁴ *Greenwald v. Insurance Co.*, 3 Phila. 323.

⁵ 10 Cush. (Mass.) 356. "The question," says Cushing, J., who gave the opinion, "is a nice one. Upon careful reflection, however, we have come to the conclusion that the received opinions on the subject, and the adjudications referred to, are in accordance with reason and principle. It seems not to be denied that actual combustion, produced by the ignition of gunpowder, is within the present policy. If, then, a combustible substance, in the process of combustion, produces explosion also, it is not easy to perceive why, of the diverse but concurrent results of the combustion, the one should be ascribed to fire any more than the other. The plain fact here is the application of fire to a substance susceptible of ignition, the consequent ignition of that substance, and immediate damage to the premises thereby. It is no sufficient answer to say that some of the phenomena produced are in the form of explosion. All the effects, whatever they may be in form, are the natural results of the combustion of a combustible substance; and as the combustion is the action of fire, this must be held to be the proximate and legal cause of all the damage done to the premises of the plaintiff.* . . .

* It would doubtless be otherwise if the policy excepted loss by explosion. See *post*, § 416 a.

powder, being set on fire accidentally by a match, exploded, set fire to a bed, charred and stained some of the woodwork,

“In the present case there is no room for question concerning a series of causes, as whether primary or secondary, proximate or remote; for the agent is one and the same throughout, namely, fire. The *causa* was burning powder; the *causa causans* was burning a match; at each stage of causation it was the action of fire. Nay, to be exact, the burning of the gunpowder, like the burning of the match, was a succession of several complex acts of burning. Yet fire is the agent at each of these distinct stages of causation. Suppose there was a barrel of sulphur in the plaintiff's attic, instead of gunpowder; and this being ignited with a match, afterwards the fire had passed from the burning sulphur to the substance of the house. This would be recognized at once as a case of fire. It does not change the legal relation of causes to substitute a barrel of burning gunpowder for a barrel of burning sulphur. The only difference in the elements of the question is, that the gunpowder, when ignited, consumes with more of rapidity than sulphur, and the combustion is accompanied or followed by explosion. Still, the agent is fire, though it acts in different ways upon the different successive subjects of its action, beginning with the match and terminating with the plaintiff's house.

“On the other hand, cases are conceivable, other than by the use of gunpowder, of explosion without any combustion, which, nevertheless, being the result of the action of fire, are still, it would seem, within the range of the general principle. Various mineral substances exist, of value in commerce and the arts, which explode by the action of fire, without either ignition or combustion. In general, any close vessel, of whatever material composed, when filled with an expansive fluid, is liable to explode by the action of heat, though it may be that the vessel and its contents are alike incombustible. The same thing happens, under certain conditions, to some forms of wood, which, although combustible, may by the action of fire explode without ignition; or which, as in the present case, of a house, by having compressed within it some burning substance, which is explosive as well as combustible, like gunpowder, may suffer the double injury of combustion in part, and in part of explosion. . . . In the hypothesis that fire is to be regarded as *causa proxima* in the present case, we can see but one supposable defect, namely, the suggestion that though it be conceded that the explosion of burning gunpowder and its effects are the action of fire, yet this particular effect on the building is not exhibited in the form of igneous action. The cases above supposed, of the shrivelling of some masterpiece of pictorial art, the cracking or discoloring of some rich vase or gem, the bursting of a cask of wine through the expansion of its contents, — these, it may be said, are distinctly cases of damage, without ignition it is true, but by the direct and specific action of heat as such; while it is denied that such is the fact in the present case of the blowing up of a dwelling-house by the ignition of gunpowder. We do not think the premises of this argument are sustained by the physical facts which occurred. If they were so, then the nearest analogy would be of damage by smoke; that is, the moisture thrown off by burning wood, and carrying with it ashes, empyreumatic oil, and other constituent parts of the wood, either in their natural condition, or transformed by the process of combustion. Now it is obvious that mere smoke, without any direct action of heat,

and blew off the roof of the house, the question was thus stated by the court: "By the ignition of gunpowder within a dwelling-house, damage is done to the house, that damage consisting in part of combustion and part of explosion. Is the *whole* damage covered by a policy insuring against 'loss or damage by fire'?" And after a very able and learned examination of the question in all its bearings, the conclusion arrived at was that, "when the effects produced are the immediate results of the action of a burning substance in contact with a building, it is immaterial whether these results manifest themselves in the form of combustion or of explosion, or of both combined. In either case the damage occurring is by the action of fire, and covered by the ordinary terms of a policy against fire." [In a Canada case it was held that where the condition makes the company liable for loss caused by the explosion of coal gas, and loss by fire caused by any other explosion, the policy does not cover the damage resulting directly from an explosion of gunpowder, but only such loss as results from fire caused by the explosion.¹ In the Dominion Supreme Court, however, this decision was reversed, and the doctrine of Massachusetts adopted, that all damage caused by the explosion is caused by fire, since combustion is inseparable from the explosion itself.² A policy insuring against damage "by fire originating in any cause" covers the results of an explosion, since it is a scientific fact that an explosion is preceded by ignition and accompanied by intense heat.³]

may do great damage to many kind of merchandise, such as delicate textile-fabrics, esculent vegetables, articles of taste, and other numerous objects; and if a dwelling or a magazine take fire, and some parts of it only be consumed, but the contents of the apartments to which the actual fire does not extend are nevertheless damaged by the smoke penetrating into and filling them, can it be doubted that the damage thus done is a loss within the ordinary conditions of a fire policy? *Semble*, per Gibbs, C. J., *arguendo*, in *Austin v. Drewe*, Holt, N. P. 127. Yet, incontestably, damage by smoke is an effect which is not in itself igneous action, though it be the result thereof; while, as we conceive, the explosion of gunpowder is igneous action."

¹ [Hobbs v. Guardian Fire Ins. Co., 7 Ont. R. 634; Hobbs v. Northern Ass. Co., 8 id. 343, Armour, J., dissenting.]

² [Hobbs v. Guardian Fire Ins. Co., 12 Can. Supr. Ct. 631.]

³ [Renshaw v. Fireman's Ins. Co., 33 Mo. App. 394.]

§ 414. **Risk ; Explosion ; Concussion.**—The court in 10 Cush. expressly avoided giving an opinion in cases where there is no ignition or combustion, and where the damage is caused merely by concussion. The question of liability in such a case arose in England,¹ where the property was injured by the concussion consequent on the explosion of a powder magazine situated at some distance from the property insured, and it was held that it could not be said that in that instance the loss was “occasioned by fire.” It was occasioned by a concussion caused by fire. And to the same effect, upon similar facts, was the case of *Caballero v. Home Mutual Insurance Company*.²

§ 415. **Risk ; Explosion ; Steam.**—It was early held that under an ordinary policy against loss by fire, loss by explosion of a steam-boiler, the explosion not being caused by any unusual fire, and no fire supervening, no recovery can be had. Such an explosion could not be distinguished from the breaking or derangement of any other part of the machinery.³ It has also been held by a divided opinion that if the fire is caused by the explosion of a steam-boiler, and the policy provides against liability “for any loss occasioned by the explosion of a steam-boiler,” the loss thereby is not recoverable under the terms of the policy.⁴ So where the policy provided

¹ *Everett v. London Ass. Co.*, 19 C. B. n. s. 126.

² 15 La. Ann. 217. See also *Brown v. St. Nicholas Ins. Co.*, 61 N. Y. 332.

³ *Millaudon v. Orleans Ins. Co.*, 4 La. Ann. 15.

⁴ *St. John v. Am. Mut. Mar. & Fire Ins. Co.*, 1 Duer (N. Y. Superior Ct.), 371; s. c. affirmed, 1 Ker. (N. Y.) 516. [“Not liable for the bursting of the boilers” means not liable for any damages resulting from or on account of the same. *Strong v. Sun Mut. Co.*, 31 N. Y. 103 at 112. And no apportionment of loss arising from such cause, or of that arising from fire following it and caused by it, can be made, and the insurer is not liable. *Montgomery v. Firemen’s Ins. Co.*, 16 B. Mon. (Ky.) 427 at 442; *Roe v. Columbus Ins. Co.*, 17 Mo. 301 at 306; *McAllister v. Tenn. Ins. Co.*, 17 Mo. 306 at 309. (In these cases the explosion was the cause of the fire, and was held to be the proximate cause of the whole loss.) Where a fire resulted from an explosion but was apparently extinguished, and afterward a second and a third time the flames broke forth, these fires were presumed to result from the explosion in the absence of contrary proof. *Tanneret v. Merchants’ Mut. Ins. Co.*, 34 La. Ann. 249. When a running policy provided that it did not cover any loss or damage “accrued at the time of the entry or indorsement, caused by any gale, disaster by explosion, fire, or otherwise, which occurrence might be known to the applicant, the pub-

that the company should not be liable for loss "by fire which shall happen or arise by any explosion," nor for loss "by explosion of any kind," it was held that the insurers were not liable for damage by fire which originated from, and was caused by, the explosion of a steam-boiler used on the premises.¹ [A condition that if the premises "be damaged by the bursting of a boiler or explosion from any cause, the policy shall be void the instant the casualty occurs," is valid and unambiguous, and an explosion with damages annuls the policy instantly.² When a policy excepts all liability for loss or damage caused by explosions the exception must be held to include all loss and damage by fire of which an explosion was the efficient cause.³ When a policy declared that the company should not be liable "for damage to property by lightning aside from fire, nor for damages occasioned by the explosion of a steam-boiler, nor for damages by fire resulting from such explosion, nor explosions caused by gunpowder, gas, or other explosive substances" it was held that the company was liable for damage by fire resulting from an explosion of gas, but not for damage caused by the explosive force of the gas without its communicating fire to the insured property.⁴ An exception in a policy of liability for loss "occasioned by explosions of any kind, by means of invasion, riots, &c.," was held not to be limited to explosions occasioned by invasion, and that the parties did not intend by a special premium to exempt from the printed exception the explosion risk.⁵

lic, or the company, at the time of such application being made, whether such property was known to be involved therein or not, &c.," and when it was known as aforesaid that a certain ship had exploded her boiler at the time of application, but not that goods to be covered by the policy were on board, it was held that the policy did not cover the loss. *Mark v. Aetna Ins. Co.*, 29 Ind. 390 at 394.]

¹ *Hayward v. Liv. & Lon. Fire & Life Ins. Co.*, 7 Bosw. (N. Y. Superior Ct.) 385; affirmed, 2 Abb. Ct. of App. Dec. 349, substantially overruling *Hayward v. Northwestern Ins. Co.*, 19 Abb. Pr. 116. And see *post*, § 418.

² [*Waldeck v. Springfield Fire & Mar. Ins. Co.*, 56 Wis. 96.]

³ [*United L. F. & M. Ins. Co. v. Foote*, 22 Ohio St. 340 at 349.]

⁴ [*Boatmen's Fire & Mar. Ins. Co. v. Parker*, 23 Ohio St. 85 at 95. The court endeavored to distinguish *United Life, &c. Ins. Co. v. Foote*, on the ground that the clause "resulting from such explosion" was placed *before* the mention of gas explosion instead of after it.]

⁵ [*Smiley v. Citizens' Fire, Mar., & Life Ins. Co.*, 14 W. Va. 33 at 52.]

But explosions resulting incidentally from the manufacture which the parties contemplate will be carried on in the building, are not excepted by a general clause against liability for explosions. For example, a policy on a flour mill covers damages by an explosion caused by the action of a fire on the flour-dust in the mill.¹ It has also been said, that the company would not be liable under an exemption from loss "by fire which might occur by means of explosion," if the explosion sets in operation the fire which burns the insured property, though the fire may travel from the seat of explosion through other buildings continuously to the building burned. In order to render the company liable, a new force or power sufficient to cause the fire must intervene; and the incidental facts of intervening buildings and favoring winds are not the equivalent of this new force.² But in a later case³ the question came again under discussion, where the provision of the policy was that the insurers should not be liable "for any loss or damage by fire caused by means of an invasion, &c., . . . nor for any loss caused by the explosion of gunpowder, camphene, or any explosive substance, or explosion of any kind," with a different result. The question was whether under this form of policy the insurers were liable for loss by fire caused by explosion.⁴ After adverting to *Hayward v. Liverpool and London Insurance Company*,⁵ as expressly in words excluding such liability, and to *St. John v. American Mutual Insurance Company*,⁶ as in the negative by a divided opinion, and pointing out the fact that the opinions of the several judges, constituting the majority, were based not merely upon different, but inconsistent grounds, thus substantially depriving the decision of its claim to be considered as an authority, and further referring to *Stanley v. Western Insurance Company*⁷ as

¹ [Washburn v. Miami Valley Ins. Co., 2 Fed. Rep. 633; 2 Flip. 664; 9 Ins. L. J. 761, 6th Cir. Ohio, 1880]

² Insurance Co. v. Tweed, 7 Wall. (U. S.) 44.

³ Commercial Ins. Co. v. Robinson, 64 Ill. 265.

⁴ The report in the Journal does not state what exploded, nor does it seem to be material.

⁵ 7 Bosw. (N. Y. Superior Ct.) 385.

⁶ 1 Ker. (N. Y.) 516.

⁷ 3 L. R. Exch. Cases, 71.

in point for the insurers, the court, after remarking that equivocal expressions must be construed most strongly *contra proferentes*, proceeds : —

“ It will be observed that in a clause of the policy preceding the one under consideration, the company stipulated that it should not be liable for any loss or damage *by fire*, caused by means of an invasion, insurrection, &c. Here exemption is specially secured against liability for losses *by fire* caused by explosion. The difference in phraseology between the two clauses is so marked that, when we consider their connection with each other, we cannot resist the conclusion that the difference was intended.

“ Whether the difference was intentional or not cannot be certainly ascertained, but it is reasonable to resolve the doubt against the company. The object of the company’s existence is to insure against fire. That is what it holds itself out to the public as able and willing to do. When a person takes out a policy and pays his premium he takes it for granted, without reading his policy, that he cannot make the risk more hazardous to the company by storing highly inflammable materials upon his premises. He knows that would be acting in bad faith with the company, and that the policy has probably provided against it ; but he would have no reason to suppose that among the voluminous stipulations of the policy there would be found one intended to deprive him of its benefit, because a fire, which has destroyed his property, originated in another house a half-mile distant, in the explosion of a camphene lamp. Most fires originate in acts of carelessness, and it is chiefly to guard themselves against the carelessness of others that prudent persons insure. Yet the construction of this policy contended for by the company, would make the assured assume the liability for the carelessness of others. He is thus deprived of the very protection he seeks by his insurance, if, when his house burns up, he can be denied the payment of his policy because the fire was caused by an explosion upon the premises of others. The great fire at Chicago is supposed to have originated in the overturning and explosion of a lamp ; but we are not aware that any of the insur-

ance companies that suffered by that fire have sought to interpose this defence, although this clause is a very common one in insurance policies, and was probably contained in many that had been issued on the property there destroyed. Counsel for the company, feeling the unreasonable character of their interpretation of this condition in cases where the fire comes from an explosion on other premises, speak of it as if it referred only to explosions on the premises of the insured. But the policy will bear no such construction or limitation. We must either hold that the clause refers to loss by explosions simply, without reference to fire, or to losses by fire occasioned by explosions anywhere, whether on or remote from the premises. There is no middle term. It must receive one of these constructions, or the other. One is consistent with the context, reasonable in itself, and just to both parties. The other requires the interpolation of two additional words in the policy, is inconsistent with the context, and in a large degree would make fire insurance a mere mockery. We cannot hesitate which construction to choose. But, say the counsel for the appellant, this company does not profess to insure against losses by explosion, but only by fire, and the clause construed as we construe it is unmeaning, or at least useless. But not so. The clause was designed to apply to all cases where the explosion was the immediate cause of the loss.

“ Suppose fire is carelessly applied to powder or other explosive substance; an explosion follows, which rends furniture and building. This explosion is the result of the ignition of the explosive material, and it might be claimed that the loss caused thereby was a loss by fire. The courts might not so hold, independently of the clause of the policy; but we can well understand, when we examine these policies, that the insurers may have introduced this clause for the purpose of leaving no room for argument or doubt. Again, suppose a case where a fire is speedily subdued, but before it is, it has ignited powder, and an explosion has taken place which has caused much damage, but has not extended the fire; in such a case the company would claim that they were protected by

this clause from liability for the consequences of the explosion. It is not necessary, however, for us to show how the clause was designed to operate. It is sufficient to say that, in our judgment, it cannot receive the construction claimed by the company.”¹

§ 416. **Risk ; Explosion ; Gas.** — On the other hand, it has been held in a very recent case in Ohio, that a policy insuring against “loss or damage by fire,” but providing that the company shall not be responsible for any “loss or damage occasioned by or resulting from any explosion whatever,” is to be construed as if the excepting clause read “loss or damage by fire,” and does not cover a loss happening from an explosion which takes place by reason of a column of an explosive mixture coming in contact with the flame of a gas-jet, whereby a fire was set in motion which destroyed the property.²

¹ The cases of *Stanley v. Western Ins. Co.*, 3 Law Rep. (Exch.) Cas. 71, usually regarded as opposed to the doctrine of the case just cited from Illinois, and the case of *Harper v. City Fire Ins. Co.*, 1 Bosw. (N. Y. Superior Ct.) 520, are referred to in the next section. In Stanley’s case, the policy exempted the insurers from liability for loss arising from explosion, except explosion by gas. The insured premises were used in the business of extracting oil, during which process a vapor was evolved, which being mixed with a certain quantity of atmospheric air, became explosive. This vapor escaping came in contact with the flame of the lamps, and an explosion ensued, succeeded by a fire. The court held that the gas intended by the policy was ordinary illuminating gas, and that the insurers were not liable for loss by concussion or from fire occasioned by the explosion, but were liable for loss, if there was any, by reason of the original fire, or any subsequent extension of that fire unconnected with the explosion.

² *United Life, Fire, & Marine Insurance Co. v. Foote*, 22 Ohio St. 340. The opinion is so able and instructive, that we give its more important parts *McIlvaine, J.* : —

“By the terms of the policy it appears that the plaintiffs were insured against ‘loss or damage by fire, to the amount of five thousand dollars, on their stocks of merchandise, consisting principally of liquors, fixtures, tools, and office furniture, contained in their brick building, situate on the southwest corner of Congress and Kilgour Streets, Cincinnati, Ohio, and occupied by them as a liquor store, with privilege of rectifying and manufacturing fine spirits by steam not generated in the building. The principal defence arose under one of the conditions of the policy, which is in these words : —

“VIL This company is not liable for loss or damage by lightning or tornado, unless expressly mentioned or insured against, but will be responsible for loss or damage to property consumed by fire occasioned by lightning. Nor will

§ 416 a. **Fire causing Explosion.** — So where the policy excluded liability “for loss by lightning or explosion of any this company be responsible for any loss or damage to property consumed by fire happening by reason of or occasioned by any invasion, insurrection, riot, or civil commotion, of any military or usurped power, nor where the loss is occasioned or superinduced by fraud, dishonesty, or criminal conduct of the insured, *nor to any loss or damage occasioned by or resulting from any explosion whatever, whether of steam, gunpowder, camphene, coal-oil, gas, nitro-glycerine, or any explosive article or substance, unless expressly insured against, and special premium paid therefor.*”

“The testimony shows that at the time of taking out the policy, and until the time of the fire, the plaintiffs were engaged in the business of rectifying whiskey and manufacturing fine spirits by the use of steam, in the building occupied by them as a liquor store, and in which the insured stock of merchandise, consisting principally of liquors, &c., was kept. The size of the building was sixty by one hundred and eighty feet, and was four stories high. There was communication between the stories through open stairways and hatches. The business of rectifying was carried on in the basement story, where the stills — large metallic vessels — were located. The upper stories were chiefly used for storage of liquors and cooperage. The process of rectifying was conducted as follows: The raw spirits of liquor was conveyed by means of pipes called leaders, from the tubs situate in the upper stories to the stills below; when the stills were thus charged, the liquor therein was converted into vapor by means of steam which passed through the stills in copper pipes called worms; the vapor thus evolved was conducted by other pipes to a condenser, where it was reduced to a liquid state. The vapor evolved in the process of rectification is an inflammable substance. It readily mixes with the atmosphere, and when so mixed in certain proportions is explosive, and when such mixture is brought into contact with flame it explodes. On the morning of the fire a large still was being charged through a leader about two inches in diameter, which passes into its still through a *vacuum valve* (an aperture in the still near its top), the diameter of which was about four inches. At the same time steam was passing through the worm, converting the liquor in the still into vapor, which escaped through the vacuum valve into the still-room, and thence no doubt into the other parts of the building. The process of thus discharging the still, accompanied with the discharge of vapor, had continued for some time, — perhaps an hour preceding the fire. During the progress of this process, two jets of gas were burning in the still-room, one at a distance of three or four feet from the vacuum valve, and the other in another part of the room. There was no other fire or flame in the room or in the building at the time.

“Such being the circumstances, an explosion took place in the still-room. A sudden and violent combustion of the vapor, accompanied with a noise, described by one witness as being like the crack of a gun; by another, as if a bundle of iron had been thrown on the pavement; by another, as a crash, and by another, as a gush of fire, and at the same instant the flame was driven through a doorway into another building, whereby a witness was badly burned. Immediately after the explosion a flame was discovered escaping from the still through the vacuum valve, and at the same time the building was discovered to be on fire

kind unless fire ensues, and then for damage by fire only," it was held, in case where it appeared that a vapor evolved throughout the several stories. From these facts and circumstances, we think it was clearly shown that the fire, by which the building and stock of merchandise insured were consumed, was occasioned by and resulted from an explosion of spirit vapor mixed with atmosphere, and that the explosion was caused by the mixture coming in contact with the burning gas-jet.

"1. The first question which we noticed particularly is this: Was the explosion which in fact occurred such, in degree of violence, as was contemplated by the parties to the policy?"

"The word 'explosion' is variously used in ordinary speech, and is not one that admits of exact definition. Its general characteristics may be described, but the exact facts which constitute what we call by that name are not susceptible of such statement as will always distinguish the occurrences. It must be conceded that every combustion of an explosive substance, whereby other property is ignited and consumed, would not be an explosion within the ordinary meaning of the term. It is not used as the synonym of combustion. And explosion may be described generally as a sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. But the rapidity of the combustion, the violence of the expansion, and the vehemence of the report, vary in intensity as often as the occurrences multiply. Hence, an explosion is an idea of degrees, and the true meaning of the word, in each particular case, must be settled, not by any fixed standard or accurate measurement, but by the common experience and notions of men in matters of that sort. In this case, although the building was not rent asunder, or the property therein broken to pieces, there was a sudden flash of flame, a rush of air, and a report like the 'crack of a gun,' which certainly brings the occurrence within the common meaning of the word as used in many instances. 'Any explosion whatever' is the phrase used in the condition to the policy, and it is qualified by the context only to the extent that it must be an 'explosion' of some 'explosive substance, and of sufficient force as to result in loss or damage to the property insured.' And these characteristics we have found to exist in the occurrence that resulted in the loss of the insured property.

"2. It is claimed that the fire which destroyed the property insured did not result from the explosion, but, on the contrary, that the explosion was incident to and caused by the fire, which, if there had been no explosion, would have accomplished the whole loss and damage; or, at least, that such inference may be drawn from the facts in the case as fairly and legitimately as contrary inferences.

"The proof unquestionably shows that the origin of the fire and the explosion was simultaneous. It may be true, in a strictly scientific sense, that all explosions caused by combustion are preceded by a fire. The scientist may demonstrate, in a case where gunpowder is destroyed by fire, or in any case where the explosion is caused by or accompanies combustion, that ignition and combustion precede the explosion; but the common mind has no conception of such combustion, as a fact independent of the explosion, where they concur in such rapid succession that no appreciable space of time intervenes. The terms of this policy must be taken in their ordinary sense; and we are satisfied that

from the material in process of manufacture, coming in contact with a burning lamp, exploded, tearing off the roof,

the proofs show, according to the ordinary sense and understanding of men in reference to such matters, that the explosion occasioned the fire which destroyed the property insured ; or, in other words, that the loss resulted from an explosion, within the true intent and meaning of this policy.

"It is true that the explosion was caused by a burning gas-jet, but that was not such fire, as contemplated by the parties, as the peril insured against. The gas-jet, though burning, was not a destructive force, against the immediate effects of which the policy was intended as a protection. Although it was a possible means of putting such destructive force in motion, it was no more the peril insured against than a friction-match in the pocket of an incendiary. The conclusions of fact to which we thus arrive are mere inferences from other facts, — facts, however, about which there was no conflict in the testimony, — yet they are so manifestly true that we think it was an error of law, under our statute, to reverse the judgment rendered thereon at the special term of the Superior Court, upon the strength of contrary inferences drawn from the same facts by the reviewing court.

"3. The next question arises upon the terms of the policy, and is one of construction purely. Was it intended by the provisions of the seventh condition to exempt from the risks assumed by the policy losses *by fire* occasioned by an explosion ?

"It is claimed that the clause exempting losses by explosion taken alone, or construed in connection with other clauses in the condition, does not show such intention. It is true that the words 'by fire,' or their equivalent, are omitted in this clause, though expressed in some of the former clauses ; the foundation point, however, in construing this condition, is found in the general undertaking of the policy. It will be observed that the underwriter undertook to insure against loss and damage by fire only, but, nevertheless, against loss and damage by fire generally ; and the maxim *causa proxima non remota spectatur* applies. Now we think, without doubting, that the purpose of inserting this condition was to relax the rigor of this maxim, and exempt from the general risk of the policy certain losses, which would otherwise fall within its scope and meaning. The first clause of the condition provides that 'this company is not liable for loss or damage by lightning or tornado, unless expressly mentioned and insured against.' If this were the whole of the clause, and it were not understood that the loss and damage referred to were such as might result from *fire occasioned by lightning or tornado*, it would be utterly meaningless and nugatory, for the reason that the underwriter had not undertaken to insure against lightning or tornado. So far the construction is plain enough ; but a difficulty arises from the conclusion of the clause, to wit, 'but will be responsible for loss or damage to property consumed by fire occasioned by lightning.' The exception to the rule of exemption from loss by lightning appears to be as broad as the rule itself. But I apprehend that a case might arise in which effect and operation could be given to all the terms of this clause, including those which are implied as well as those expressed. At all events, it is perfectly clear that loss and damage by lightning and tornado are not within the ex-

shattering the walls, and damaging the machinery, upon which a fire supervened, that the insurers were liable for pressed risks of the policy, unless a fire supervenes; nor is there anything in the policy from which such risks can be implied.

"The condition continues: 'Nor will the company be responsible for any loss or damage to property consumed by fire happening by reason of or occasioned by any invasion, insurrection, riot, or civil commotion, or any military or usurped power.' The exemptions here provided for are expressly limited to losses within the terms of the general risk of the policy. But if such limitation had not been expressed, it would have been implied."

"The next clause is as follows: 'Nor where the loss is occasioned or superinduced by the fraud, dishonesty, or criminal conduct of the insured.' There is no pretext for holding that the loss here contemplated is other than loss by fire, although no such qualification is expressed. Then follows the clause in question, which, to all intents and purposes, is framed like the preceding one: 'Nor to any loss or damage occasioned by or resulting from any explosion whatever, whether of steam, gunpowder, camphene, coal-oil, gas, nitro-glycerine, or any explosive article or substance, unless expressly insured against and special premium paid therefor.'

"Unless there is something in the subject-matter of this clause that indicates that the words 'by fire' were omitted for the purpose of showing a design and intention to adhere to and continue the general risk in case an explosion should result in a fire, we think that they or their equivalents should be supplied by implication or construction. Is such purpose indicated by any fair use of the terms employed? That a loss, or any other combustion, results from an explosion, where the explosion itself is caused by a destructive fire already in progress, comes within the general risk of a policy against fire only, is a doctrine not only reasonable in itself, but is sustained by authority. *Waters v. La. Mer. Ins. Co.*, 11 Pet. 213; *Scripture v. Low. Mut. Fire Ins. Co.*, 10 Cush. 357; *Mil-laundon v. N. O. Ins. Co.*, 4 La. Ann. 15. And it is quite clear that a loss by fire which is occasioned by an explosion is within the like risk. Now, the express terms of this clause are, 'any loss or damage occasioned by or resulting from any explosion whatever.' These terms are certainly comprehensive enough to include both descriptions of loss, — whether loss by the explosive force, or loss by superinduced combustion. And that such is their legal effect has been directly decided in the case of *Stanley v. Western Insurance Company*, Law Reports, 1868, 3 Exch. Cas. 71. It is not necessary at this time to either approve or disapprove to the whole extent the doctrine in Stanley's case,* as in this case no damage was sustained from the explosion without the intervention of a fire, nor, indeed, was the explosion caused by a fire within the meaning of the policy. But we can find no good reason for doubting that loss and damage by fire, resulting from an explosion, was intended to be exempted by this condition from the general risk of the policy, and are of opinion, therefore, that this clause, properly construed, should read, 'nor any loss or damage by fire occasioned by or resulting from any explosion whatever.'

"4. It is claimed by defendants in error that the peril by which the property

* *Ante*, § 415, n.

the damage done by the fire, but not for that done by the explosion.¹ If under such a policy the fire precedes the explosion insured was destroyed was within the exception to the seventh condition; that is, it was 'expressly insured against, and special premium paid therefor;' or, in other words, was excepted out of the exception.

"The reasoning by which this proposition is sought to be maintained is thus stated:—

"The body of the policy covered loss by fire on liquors, &c., with the privilege of rectifying and manufacturing fine spirits by steam not generated in the building. The property insured was whiskey, as well in the process of rectification and manufacture as manufactured whiskey in the still, as well as spirits in the barrel,—the whiskey vapor itself, while passing through the columns to the cooler, or wherever else it might make its way.

"If it was in this form an *explosive substance or article*, such as is intended by the language of the condition, or if in the process of manufacture allowed by the policy it was likely to become such by escape and mingling with the air in the building, then the insurance was upon it, as an agent known to be explosive under certain circumstances likely to happen, and with the express assent of the company to the carrying on of that process, in the course of which its explosive nature would naturally and probably be developed.

"The principle sought by this argument to be applied is announced in *Harper v. New York City Insurance Company*; the condition exempted the company from liability for loss occasioned by *camphene*. The fire was occasioned by a workman's throwing a lighted match into a pan upon the floor containing camphene. The risk was upon a printing stock, privileged for a printing-office, camphene not being expressly enumerated. But it was shown that that article was a usual part of such a stock, and its use was therefore authorized. For this reason alone, because it was implicitly insured, it was held that the exception did not apply.

"The following extract from the opinion expresses its doctrine:—

"A policy can be so framed as to allow the presence of a dangerous article, and even so as to insure its value, while at the same time it might exempt the insurer from loss if occasioned by the presence or use of the article. But I think it would need very great precision of language to express such an intention. Where camphene or any hazardous fluid is insured, and its use is plainly admitted, the dangers arising from that source are so obviously within the risk undertaken, that effect should be given to the policy accordingly, unless a different intention is very plainly declared."

"In answer to this claim, we say:—

"1. That the spirit vapor, having escaped from its confinement and passed into the still-room, where it became mixed with atmosphere so as to form an explosive substance, under circumstances that precluded all possibility of reclaiming and utilizing it, it was no longer a part of the stock of merchandise insured, and was not under the protection of the policy.

"2. If, from the nature of the property insured, the parties, at the time the

¹ *Briggs v. N. Am. Ins. Co.*, 53 N. Y. 446; *Briggs v. N. Br., &c. Ins. Co.*, 66 Barb. (N. Y.) 325.

sion, the entire loss is to be attributed to the fire, though the explosion be destructive.¹ And, perhaps, if there be no fire but the ignition of the explosive material, the whole loss must be attributed to the explosion.² Where the insurers were not to be liable for collision unless, fire ensued, and then only for the loss and damage by fire, and the policy further stipulated that they were not to be liable for fire arising from petroleum, it was held that they were not liable for loss caused by fire after the collision arising from petroleum.³

§ 417. **Risk ; Collision ; Proximate Cause.** — A case of considerable delicacy has recently been before the United States Circuit Court of Connecticut, — the case of the Norwich and New York Transportation Company *v.* The Western Massachusetts Insurance Company,⁴ — in which the question was, whether where a steamer collided with a sailing-vessel, whereby

risk was taken, might reasonably have anticipated the peril by which it was afterward destroyed, it is reasonable to suppose that such peril was in contemplation at the time, and that they contracted in reference to it. Hence, if the general risk of the policy was expressed in terms broad enough to include the peril, it must be presumed that they intended to do so ; and, on the other hand, if an exception to the risk was made in terms which fairly and plainly took such particular peril out of the general risk, it must be presumed that they intended to exempt such particular peril from the risk. Again, if it be claimed that there was an exception to such exemption, whereby the particular peril was saved from the exemption and left under the general risk, it is reasonable that the terms of exception should be at least as explicit as the terms of exemption. How is it in this case ? The risk was against all loss by fire.

“ The exception from the risk was ‘ any loss or damage occasioned by an explosion of steam, gunpowder, &c.’ The exception to this exception was, ‘ unless expressly insured against, and special premium paid therefor.’ Therefore it only remains to be said, that no loss or damage occasioned by an explosion of any of these substances named was expressly insured against, nor was any special premium paid for any such special risk.”

¹ [If a fire occurs by a cause within the policy, and an explosion takes place as an incident to the fire so as to increase the loss, the whole damage is within the policy, although it contains an exemption from liability for explosion. *Transatlantic Fire Ins. Co. v. Dorsey*, 56 Md. 70.]

² *Washburn v. Artisans' Ins. Co.*, 9 Ins. L. J. 68 ; *Washburn v. Insurance Companies*, C. Ct. (Ohio), id. 761, where Tweed's case, *ante*, § 415, is distinguished. See also *ante*, § 413.

³ *Imperial Fire Ins. Co. v. Express Co.*, 95 U. S. 227.

⁴ 34 Conn. 561. See § 417 A.

the steamer was so much disabled that she sank till the water rose to her furnaces and forced the fire out upon her woodwork, which continued to burn till her upper works were consumed, when she sank and became a total loss, — whether this was a loss by fire. And it was held that this depended upon the fact, submitted to the jury, whether but for the intervention of the fire she would have filled and gone to the bottom. If she would, then it was not a loss by fire ; but if, on the other hand, she would only have filled and partially sunk, had not the fire intervened, but yet remained in such a condition that she might have been towed to a place of safety and repaired, then it was a loss by fire. The fire was the proximate cause of the loss.

The same facts in another case¹ came before the court, and went, on appeal, to the Supreme Court. The case was tried without the intervention of a jury, and the court below found as follows : —

“ While on one of her regular trips from Norwich to New York, on Long Island Sound, the steamer collided with a schooner, the latter striking her on her port side, and cutting into her hull below the water line, in consequence of which she immediately and rapidly began to fill with water. Within ten or fifteen minutes after the collision, the water reached the floor of the furnace, and the steam thereby generated blew out the fire, which communicated with the woodwork of the boat. Her upper works and her combustible freight were soon enveloped in flames, and they continued to burn half or three quarters of an hour, when she gradually sank in twenty fathoms of water, keeling over. The steamer was so constructed that her main deck was completely housed in from stem to stern, up to her promenade or hurricane deck above. Her freight was stowed on the main deck, and her cabin and staterooms were on the hurricane deck. From the effects of the collision alone she would not have sunk below her promenade deck, but would have remained there suspended in the water, and would have been towed to a place of safety, where she, her engines, tackle, and furniture

¹ Howard Fire Ins. Co. v. Norwich & N Y. Transp. Co., 12 Wall. (U. S.) 194.

could have been repaired and restored to their condition prior to the collision for the sum of fifteen thousand dollars, the expense of towage included. The sinking of the steamer below her promenade deck was the result of the action of the fire in burning off her light upper works and housing, thus liberating her freight, allowing much of it to drift away, whereby her floating capacity was greatly reduced, so that she sunk to the bottom; and all the damage which she suffered beyond the fifteen thousand dollars above named as chargeable to the collision (amounting to seventy-three thousand dollars), including the cost of raising the boat, was the natural and necessary result of the fire, and of the fire *only*.

“It is now urged in behalf of the plaintiffs in error that these findings establish the sinking of the steamer, wherein consisted principally the loss, or that part of it in excess of fifteen thousand dollars chargeable to the collision, was the result of two concurrent causes, one the fire, and the other the water in the steamer’s hold, let in by the breach made by the collision. As the influx of the water was the direct and necessary consequence of the collision, it is argued that the collision was the predominating, and therefore the proximate, cause of the loss. The argument overlooks the fact, distinctly found, that the damage resulting from the sinking of the vessel was the natural and necessary result of the fire only. If it be said that this was but an inference from facts previously found, it was not for that reason necessarily a mere legal conclusion.

“But we need not rely upon this. Apart from that finding, the other findings, unquestionably of facts, show that neither the collision nor the presence of water in the steamer’s hold was the predominating, efficient cause of her going to the bottom. That result required the agency of the fire. It is found that the water would not have caused the vessel to sink below her promenade deck, had not some other cause of sinking supervened. It would have expended its force at that point. The effect of the fire was necessary to give it additional efficiency.

“The fire was, therefore, the efficient, predominating

cause as well as nearest in time to the catastrophe, which not only directly contributed to all the damage done, after the steamer had sunk to her promenade deck, but enlarged the destructive power of the water, and rendered certain the submergence of the vessel. This plainly appears, if we suppose that the fire had occurred on the day after the collision, and had originated from some other cause than the collision itself. The effects of the prior disaster would then have been complete.

“The steamer would have been full of water, sunk to her promenade deck, and, remaining thus suspended, would have been towed to a place of safety and saved, in that condition, to her owners, except for the new injury. But the fire occurring on the next day, destroying the upper works and the housing, thus liberating the light freight and greatly reducing the floating capacity of the steamer, would have caused her to sink to the bottom as she did. In the case supposed, the water would have been as truly a concurrent and efficient cause of the steamer’s sinking, as it was in the case now in hand. It would have operated in precisely the same manner, remaining dormant until given new activity. But could there have been any hesitation in that case, in determining which was the proximate, the efficient, predominating cause of the sinking of the vessel? And can it be doubted that the underwriters against loss by fire would be held responsible for such a loss?

“Wherein does the case supposed differ in principle from the present, when the facts found are considered? True, the fire in this case was caused by the collision, but the policy insured against fire caused by collision. True, the fire immediately followed the filling of the steamer with water, or commenced while she was filling, but the effects of the fire are conclusively distinguished from the breach in the steamer’s hull, and the filling of her hold with water.

“The damages caused by the several agencies have been discriminated, and its proper share assigned to each. It is an established fact that the damaging effect of the water, independent of the fire, would not have reached beyond sinking

of the steamer to its upper deck, when she would have been saved from further injury.

“There is, undoubtedly, difficulty in many cases attending the application of the maxim, ‘*proxima causa non remota spectatur*,’ but none when the causes succeed each other in order of time. In such cases the rule is plain. When one of several successive causes is sufficient to produce the effect, for example, to cause a loss, the law will never regard an antecedent cause of that cause, or the ‘*causa causans*’¹ In such a case there is no doubt which cause is the proximate one within the meaning of the maxim. But when there is no order of succession in time, when there are two concurrent causes of a loss, the predominating, efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished.”² Loss by fire caused by collision is covered by a fire policy, collision not being excepted.³ [A loss by collision without fault on either side is a loss “by the perils of the sea” within the policy.⁴ The company does not insure against the misconduct of the master and crew of a vessel, P., insured by it, and if by such misconduct P. runs

¹ Gen. Mut. Ins. Co. v. Sherwood, 14 How. 351, 366.

² See also Brown v. St. Nicholas Ins. Co., 61 N. Y. 332; Allison v. Corn Exch. Ins. Co., 57 N. Y. 87. These two cases well illustrate the perplexities of the courts in the application of settled rules. In the former, a canal-boat, while being towed down the Delaware, was separated by a heavy gale from the tug, and forced ashore. Ice did not interfere with navigation at the time, but during the same night ice formed about the boat, so that the tug could not reach it. After the thaw, wind and ice forced the boat on another vessel, and she was sunk by the collision. It was held that the gale, and not the ice, was the proximate cause. In the latter case, a canal-boat was at her moorings. In March, a great accumulation of ice took place in the river, by which a dam was formed, which caused the water to overflow into the canal basin, whereby the boat was damaged. In this case it was held that the ice was the proximate cause. In Ionides v. Universal Ins. Co., 10 Jur. n. s. 18, the captain lost his reckoning by reason of the extinguishment of the light at Cape Hatteras by the Confederates, and the ship went ashore. The loss was held to be by reason of the perils of the sea, and not by reason of hostilities. See also Taunton v. Royal Ins Co., 2 H. & M. 235, where it was unsuccessfully contended that where property is destroyed by an explosion of gunpowder the proximate cause was the concussion of the air, and that the fire was the remote cause.

³ Germania Ins. Co. v. Sherlock, 25 Ohio St. 33.

⁴ [Peters v. Warren Ins. Co., 14 Pet. 99 at 108.]

into another vessel, B. and B. recovers a judgment against the vessel P., the latter cannot hold the insurance company liable to refund such money to it, although collision is one of the perils insured against. The proximate cause of loss to P. in the case is not collision but negligence. Without this feature the collision would have given B. no cause of action against P.¹ When a policy provided that the company should not be responsible for loss arising from petroleum or other explosive oils, and when by a collision of two trains a fire was started by the petroleum in one of them, by which the goods were destroyed, it was held that the company was not liable.²

[§ 417 A. **Proximate Cause is a Question of Fact for the Jury.**³—Where the company was not to be liable for “derangement or breaking of machinery or any consequence thereof,” and it appeared that the mud valve was out of order, and steam was blown off to make repairs, during which the master, although he saw repairs going on, ordered the boat to be let go without inquiring into the state of the steam, and because there was not steam enough to work her, the ship went over the falls of the river and was badly damaged, it was held that the insurers were liable.⁴ Goods on a steamboat were insured against “immediate loss by fire.” A collision occurred which caused a fire to break out. The vessel afterward sank before the fire reached the insured goods. It was held that if the goods would not have been lost but for the fire, it was a case of loss by fire. It is not necessary that the insured property should be injured or consumed by the fire. The insurer is liable for all losses which result from the fire, and can be fairly attributed to it. If the property is injured by water used to put out the fire, or the vessel sink because the fire renders it impossible to run the engine or stop the leak, the loss is within the policy.⁵ When a ship was stranded and

¹ [Mathews v. Howard Ins. Co., 11 N. Y. 9, 17-19.]

² [Insurance Co. v. Express Co., 95 U. S. 227 at 232.]

³ [Penn. R. R. v. Hope, 80 Pa. St. 372, engine sparks; Penn. R. R. v. Kerr, 62 Pa. St. 353, distinguished. See Milwaukee v. Kellogg, 94 U. S. 469.]

⁴ [Orient Ins. Co. v. Adams, 123 U. S. 67 (1887.).]

⁵ [New York Exp. Co. v. Traders' Ins. Co., 132 Mass. 377, 381.]

lost practically, and while in that condition the goods on board were captured by enemies, it was held a loss covered by a policy "free from capture or seizure."¹ But where barratry is insured against and capture excepted, a seizure in consequence of the barratrous act of the master frees the company. The barratry would not have caused loss but for the capture.²

§ 418. **Risk ; Explosion ; Proximate Cause.** — An interesting marine case was recently before the New York Commission of Appeals,³ in which arose the question whether a steamship which was insured under a policy which excepted loss by the bursting of boilers, but covered all losses "occurring subsequent to and in consequence of such bursting," and the loss of which was occasioned by such a violent explosion as to sink her in five or ten minutes, was protected by the policy. And it was held that she was not, on the ground that upon the explosion the vessel became valueless, and the loss total and immediate, and not subsequent to the cause that occasioned it.⁴ We have already seen⁵ that where a building falls in ruins, and the ruins take fire from combustion of chemicals which were amongst the stock, no recovery can be had, the destruction being by the fall, and not by the fire.

§ 419. **Risk ; Intemperance ; Wound ; Proximate Cause.** — Intemperance, doubtless, in a general sense, shortens life; but it is not, therefore, a cause of death within the meaning of a policy made void if the applicant should die by reason of intemperance from the use of intoxicating liquor. The consequences of such a construction would be that an insurance company which had insured the life of one known to be intemperate, and had charged a higher rate of premium on that very account, could exonerate itself from liability by showing that the life of the assured had been shortened by

¹ [Hahn v. Corbett, 2 Bing. 205 at 210.]

² [Cory v. Burr, 8 Q. B. D. 313; 9 Q. B. D. 463; 8 App. Cas. 393.]

³ Evans v. Columbian Ins. Co., 44 N. Y. 146.

⁴ Hunt, C., dissents in an opinion of great force and acuteness, to which we refer, as containing some excellent illustrations of the distinction between proximate, mediate, and remote causes.

⁵ Nave v. Home Ins. Co., 37 Mo.; ante, § 412.

intemperance. A sound principle does not lead to consequences so unjust and unreasonable. A proximate cause of an effect is that which immediately precedes and produces it, as distinguished from the remote, mediate, or predisposing cause. When several causes contribute to death as a result, it may be difficult to determine which was the remote and which the immediate cause; yet this difficulty does not remove the necessity of such determination.¹ The same case came before the court again,² when it appeared that the insured in a fit of *delirium tremens* escaped from those having him in charge, ran out into the streets, and was exposed in scanty clothing to the inclemency of the weather, which exposure contributed, with intemperance, to bring on congestion of the lungs, of which he died. And the court held that these facts would support a defence on the ground of intemperance, under a clause exempting the insurers from liability if the insured should die "by reason of intemperance from the use of intoxicating liquor." Whether the congestion was caused by the exposure or intemperance, they were both the direct consequences of his intemperate use of intoxicating liquor. And where the insured was wounded, and the wound, not causing his death, caused him to fall into the water, whereby he was drowned, it was held to be a death by accident. And on appeal the court say:—

"The part of the charge to the effect that if the wound led to the cause of the death then it would be an accidental death, could have been understood only in the sense of the wound being produced by an accident, but that this, not causing death, did cause him to fall into the water, where he died from drowning, then the death was accidental; so understood, it was entirely correct."³

[§ 419 A. **Intemperance.**— If a policy is to be forfeit if the insured does not obey the rules of the association, it will be avoided if he uses intoxicating liquors as a beverage in viola-

¹ *Miller v. Mut. Ben. Life Ins. Co.*, 31 Iowa, 216.

² 34 Iowa, 222; *New York Life Ins. Co. v. Boiteaux*, 5 Big. Life & Acc. Ins. Cas. 437.

³ *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52.

tion of one of the rules.¹ Among the Royal Templars a violation of the total abstinence pledge will forfeit the insurance.² The words "sober and temperate" do not imply total abstinence, though frequent intoxication is a breach.³ Where a policy is to be void if the insured becomes so intemperate as to seriously impair his health, evidence that what he drank was sufficient to seriously impair a man's health is inadmissible; there must be evidence that *his* health was impaired.⁴ A stipulation that if the assured shall become intemperate to a certain degree the policy may be cancelled, will control a general provision that such intemperance shall avoid the policy.⁵ Excessive drinking of liquor is a violation of a warranty that the insured "will not practise any pernicious habit that obviously tends to shorten life."⁶ When a habit of intemperance is in issue it is competent to ask a witness if he has ever seen the insured under the influence of liquor, or has seen him take more than one drink, and after drinking act uproariously, abusing his family, &c.⁷ The beneficiary is not estopped by the physician's statements of the cause of death.⁸ Where all the time the agent knew the insured to be an habitual drunkard, the condition against intemperance cannot be insisted upon by the company, but this knowledge does not prevent the avoidance of the policy under another clause if the insured dies from the effects of intoxication.⁹

§ 420. **Risk ; Property covered by the Policy.** — If it be doubtful what goods or buildings or places are covered by the policy, the doubt will be resolved against the insurers, and evidence will be admissible to resolve the doubt.¹⁰ A policy

¹ [Hogins v. Supreme Council, &c., 76 Cal. 109.]

² [Royal Templars of Temperance v. Curd, 111 Ill. 284.]

³ [Brockway v. Mut. Ben. Life Ins. Co., 9 Fed. Rep. 249 (Pa.), 1881.]

⁴ [Odd Fellows Mut. Life Ins. Co. v. Rohkopp, 94 Pa. St. 69.]

⁵ [Northwestern Mut. Life Ins. Co. v. Hazelett, 105 Ind. 212.]

⁶ [Schultz v. Mut. Life Ins. Co., 10 Ins. L. J. 171, 2d Cir. (N. Y.), 1881; 6 Fed. Rep. 672; Brockway v. Mut. Ben. Life Ins. Co., 10 Ins. L. J. 762; 9 Fed. Rep. 249.]

⁷ [United Brethren Mut. Aid Soc. v. O'Hara, 120 Pa. St. 256.]

⁸ [Bentz v. Northwestern Aid Ass., 40 Minn. 202.]

⁹ [Newman v. Covenant Mut. Ins. Ass., 76 Iowa, 56.]

¹⁰ Franklin Fire Ins. Co. v. Updegraff, 43 Pa. St. 350; Clark v. Firemen's Ins.

on "wearing-apparel, furniture, and stock of a grocery," does not cover "linen and sheets" smuggled and intended for sale; and a watch, being a memorandum article, is not included in wearing-apparel;¹ nor is a stock of linen-drapery goods included in "household furniture, linen, wearing-apparel, and plate," though the insured, who was not a linen-draper, was also insured upon his stock in trade. By the maxim *noscitur a sociis* "linen," in this case, was held to cover only household linen.² But household furniture covers furniture stored in the garret for use.³ "Stock in trade," as applicable to mechanical pursuits, is to have a more extended application than as applied to a merchant's stock in trade. It includes, in the former case, the fixtures and implements of business.⁴ Furniture and movables are not "fixtures."⁵ "Jewelry and clothing," being stock in trade, will not cover musical instruments, surgical instruments, guns, pistols, and books;⁶ but "stock of watches, watch trimmings, &c.," includes within its comprehension plate, silver-ware, and the tools of trade, and such other articles as form part of similar stocks in the locality where the insurance is effected.⁷ "Merchandise" will not cover articles kept for use, while "property" will.⁸ ["Merchandise" in a policy will generally, at least, be applied to goods for sale, and does not include a "beam-scale," belting, &c., in a warehouse, the policy being on "grain and

Co., 18 La. Ann. 431; *ante*, § 367; *Burr v. Broadway Ins. Co.*, 16 N. Y. 267; *Beatty v. Lycoming Ins. Co.*, 52 Pa. St. 456, *Lycoming Ins. Co. v. Sailor*, 67 id. 108; *Neve v. Columbian Ins. Co.*, 2 McMullan (S. C.), 220; *Whitmarsh v. Conway Fire Ins. Co.*, 16 Gray (Mass.), 359; *Planters' Ins. Co. v. Engle*, 52 Md. 468; *Steele v. Franklin Fire Ins. Co.*, 17 Pa. St. 290; *post*, § 424. Even subsequently acquired or added property may be shown to have been within the intention of the parties, the description being sufficient to cover it. *Perry County Ins. Co. v. Stewart*, 17 Pa. St. 45.

¹ *Clary v. Prot. Ins. Co.*, *Wright* (Ohio), 227.

² *Watchorn v. Langford*, 3 Camp (N. P.) 422.

³ *Clark v. Firemen's Ins. Co.*, 18 La. 431.

⁴ *Moadinger v. Mech. Fire Ins. Co.*, 2 Hall (N. Y. Superior Ct.), 490.

⁵ *Holmes v. Charlestown Mut. Ins. Co.*, 10 Met (Mass.) 211.

⁶ *Rafael v. Nashville Mar. & Fire Ins. Co.*, 7 La. Ann. 244.

⁷ *Crosby v. Franklin Ins. Co.*, 6 Gray (Mass.), 504.

⁸ *Burgess v. Alliance Ins. Co.*, 10 Allen (Mass.), 221. See § 239.

other merchandise.”¹ Silver spoons and forks are not “plate,” as that word is commonly understood;² nor does “refined oil” cover lard oil.³ “House” or “building” embraces everything appurtenant and necessary to the main building, and used though not connected with it, or represented in the plan as part of it.⁴ “Ship-yard” embraces such places as are ordinarily used as part of the yard, though within the street.⁵ “On the line of the road” includes all branches used by the railroad;⁶ and “on their premises” includes a boat lying at the wharf of a railway company.⁷ “Cars owned or used by the company” includes cars belonging to other railroads than the insured.⁸ But an “unfinished house” does not include materials prepared for its completion, and deposited in an adjoining one, which was also insured.⁹ Nor does insurance on a “bark now being built” include materials prepared to put into her, lying about the yard;¹⁰ and insurance on “lumber manufactured, and in the process of manufacture in said building,” will not cover lumber in the yard,¹¹ but “stock manufactured, or in process of manufacture,” covers raw or unmanufactured stock.¹² Such materials are not covered by the policy until they become a part of the vessel.¹³ But “stock of lumber” will include pieces partly prepared to put into the vessel.¹⁴

¹ [Kent v. Liverpool & London Ins. Co., 26 Ind. 294 at 298.]

² Hanover Fire Ins. Co. v. Mannasson, 29 Mich. 316.

³ Weisenberger v. Harmony Ins. Co., 56 Pa. St. 442.

⁴ Workman v. Insurance Co., 2 La. 507; Blake v. Exch. Mut. Ins. Co., 12 Gray (Mass.), 265; White v. Mut. Fire Ins. Co., 8 id. 566.

⁵ Webb v. Nat. Fire Ins. Co., 2 Sandf. (Superior Ct. N. Y.), 497.

⁶ Fitchburg R. R. Co. v. Ch. Mut. Ins. Co., 7 Gray (Mass.), 64.

⁷ Farmers' &c. Ins. Co. v. Harmony, &c. Ins. Co., 51 Barb. (N. Y.) 33; affirmed, 41 N. Y. 619.

⁸ Commonwealth v. Hide, &c. Ins. Co., 112 Mass. 136. In Annapolis, &c. Ins. Co. v. Baltimore Ins. Co., 32 Md. 37, the words “contained in” were held, under the peculiar wording of the policy and the circumstances of the case, to cover certain cars only while they were in the car-houses.

⁹ Ellmaker v. Franklin Fire Ins. Co., 5 Pa. St. 183.

¹⁰ Mason v. Franklin Ins. Co., 12 G. & J. (Md.) 468.

¹¹ North Am. Ins. Co. v. Throop, 22 Mich. 146.

¹² Spratley v. Hartford Ins. Co., 1 Dill. Ct. 392.

¹³ Ibid.; Hood v. Manhattan Fire Ins. Co., 1 Ker. (N. Y.) 532, reversing s. c. 2 Duer (Superior Ct. N. Y.), 191.

¹⁴ Webb v. Nat. Fire Ins. Co., 2 Sandf. (Superior Ct. N. Y.) 497.

“Steam sawmill” includes machinery necessary to its operation.¹ And so does “starch factory,”² and “grist-mill.”³ [The word “factory” does not necessarily mean a single building, but may include several where they are used together for a common purpose in the same inclosure, unless by the terms of the policy restricted to one.⁴] “Machinery” includes all the essential parts, such as “dyes” necessary to its successful and productive operation;⁵ and “mill building” may include the machinery in the building.⁶ But insurance on “logwood warehouse, in which chopping dyewood is performed,” was held so unequivocally not to cover machinery therein as to make evidence inadmissible.⁷ Paper bags are not tools of a flour-mill.⁸ But patterns used for making castings, when applied by hand, are “tools of trade.”⁹ Wearing apparel is protected while in ordinary use, though away from its usual place of deposit;¹⁰ so is a carriage out for repairs,¹¹ and a thrashing-machine out for use;¹² so are mules and horses in actual use about the premises, or in the prosecution of its business.¹³ “Grain in stacks” may include flax.¹⁴ “Cattle” includes hogs,¹⁵ and “grain” has been held to include pease,¹⁶

¹ *Bigler v. New York Cent. Ins. Co.*, 20 Barb. (N. Y.) 635.

² *Peoria Mar. & Fire Ins. Co. v. Lewis*, 18 Ill. 553.

³ *Shannon v. Gore, &c. Ins. Co.*, 2 Ont. App. Rep. 896.

⁴ [*Liebenstein v. Baltic Fire Ins. Co.*, 45 Ill. 301.]

⁵ *Seavey v. Central Ins. Co.*, 111 Mass. 540; *Washington Ins. Co. v. Davison*, 30 Md. 91; *Buchanan v. Exch. Fire Ins. Co.*, 61 N. Y. 26.

⁶ *Brugger v. State, &c. Ins. Co., C. Ct. (Or.)*, 8 Ins. L. J. 293; *Excelsior Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343.

⁷ *Hare v. Barstow*, 8 Jur. 928.

⁸ *Hutchinson v. Niagara, &c. Ins. Co.*, 39 U. C. (Q. B.) 483.

⁹ *Lovewell v. Westchester Ins. Co.*, 124 Mass. 418.

¹⁰ *Longueville v. Western Assurance Co.*, 51 Iowa. 553.

¹¹ *McCluer v. Girard Fire Ins. Co.*, 43 Iowa, 349.

¹² *Everett v. Continental Ins. Co.*, 21 Minn. 76.

¹³ *Holbrook v. St. Paul Mar. & Fire Ins. Co.*, 25 Minn. 229; *ante*, § 219; *Mills v. Farmers Ins. Co.*, 37 Iowa, 400. But see *Gorman v. Hand-in-Hand Ins. Co.*, 11 W. R. C. L. 224, where, by a very strict construction, hay not specified and horses and agricultural implements while away from their specified places were held not to be covered by the policy.

¹⁴ *Hewitt v. Watertown Fire Ins. Co. (Iowa)*, 10 Ins. L. J. 375.

¹⁵ *Decatur Bank v. St. Louis Bank*, 21 Wall. (U. S.) 294.

¹⁶ *State v. Williams*, 2 Strobb. (S. C.) 474.

millet, and sugar-cane seed.¹ And insurance on "all the articles making up the stock of a pork-house, and all within the building and pertinent thereto," covers everything properly belonging to the stock of a pork-house, without regard to individual ownership, although the policy states that goods on commission are to be insured as such.² "Articles used for packing" and "in packing" include coal to carry on the works.³

[§ 420 A. **Property Covered** (*continued*). — What is covered by the description is a question for the jury.⁴ Although the words of a policy may be broad enough to cover certain goods, evidence of facts outside the policy is admissible to show that those goods were not intended to be covered.⁵ If enough of the description is true to identify the property, other portions of it which are false will be disregarded, when the question is merely what property was insured.⁶ Evidence will be received as to the identity of the property destroyed and that insured. Describing a story-and-a-half house as a "one story" house is not fatal. Until the misdescription affects not merely the question of identity but the nature of the risk it is not material.⁷ A "three story granite building" mentioned in a policy may mean a building with a granite front only, and three stories high in front and at the rear, though only one story in the middle.⁸ Insurance on a "stock of hair, wrought, raw, and in process" does not extend to fancy goods made of other materials, although usually kept and sold in a retail hair store.⁹ An insurance on a ship and "property on board" covers bank bills, the property of the assured.¹⁰ Also when the insurance was for the benefit of the master, whose

¹ *Holland v. State*, 34 Ga. 455.

² *Ætna Ins. Co. v. Jackson*, 16 B. Mon (Ky.) 242, 250.

³ *Phoenix Ins. Co. v. Favorite*, 49 Ill. 259; *Home Ins. Co. v. Favorite*, 46 id. 263.

⁴ [*Southwest Lead & Zinc Co. v. Phoenix Ins. Co.*, 27 Mo. App. 446.]

⁵ [*Richardson v. Home Ins. Co.*, 47 N. Y. Super. 138.]

⁶ [*Hatch v. New Zealand Ins. Co.*, 67 Cal. 122.]

⁷ [*Eakin v. Home Ins. Co.*, 1 Tex. Civ. Cas. §§ 1234, 1235.]

⁸ [*Medina v. Builders, Mut. Fire Ins. Co.*, 120 Mass. 225 at 226.]

⁹ [*Ibid.*]

¹⁰ [*Whiton v. Old Colony Ins. Co.*, 2 Met. 1 at 3.]

only interest was his commission; this was held covered.¹ "Iron" includes steel.² Rice is not "corn" within the meaning of a policy of insurance.³ Common repute among merchants dealing in the article is admissible to show what is and what is not included in the term "fur."⁴ Evidence is admissible to prove a usage among owners of whale-ships and underwriters to treat a policy on outfits as covering one-fourth part of the catchings.⁵ On a general policy of insurance on a ship, evidence is inadmissible to show that the common custom and usage of underwriters is not to pay for boats slung on the outside of the ship.⁶ When a cargo of lumber, &c., was consigned to a master of a vessel and shipped thereon, and the owner was to pay as freight three-fifths of the lumber and a sum of money for the other articles, and a total loss occurred, it was held that a policy made by the master on the property on board covered the three-fifths of the lumber, but not the money⁷ payable on the other articles. Freight cannot be insured as property, but in this case as to lumber there was an interest in the property.]

[§ 420 B. **Property Covered** (*continued*). — A policy for a long period upon goods in a retail shop applies to the goods successively in the shop from time to time.⁸ Where a policy covered "a planing mill and *addition*" and "machinery, shafting, &c.," the engine room twenty-two feet away and connected by a shaft and a spout was held to be designated as the *addition*, there being no other.⁹ A policy on an "elevator building and additions" covers adjacent buildings attached to and used with the elevator.¹⁰ An insurance on "chair lumber and such other stock as is usually used in a chair

¹ [Holbrook v. Brown, 2 Mass. 280 at 282.]

² [Hart v. Standard M. Ins. Co., 22 Q. B. D. 499.]

³ [Scott v. Bourdillon, 5 B. & P. 213 at 213.]

⁴ [Astor v. Union Ins. Co., 7 Cowen, 202 at 214.]

⁵ [Macy v. Whaling Ins. Co., 9 Met. 354 at 364.]

⁶ [Blackett v. Royal Exch. Ass. Co., 2 C. & J. 244 at 249.]

⁷ [Wiggin v. Mercantile Ins. Co., 7 Pick. 271 at 274.]

⁸ [Hooper v. Hudson R. F. Ins. Co., 17 N. Y. 424 at 426.]

⁹ [Home Mut. Ins. Co. v. Roe, 71 Wis. 33.]

¹⁰ [Cargill v. Millers', &c. Mut. Ins. Co., 33 Minn. 90.]

manufactory, contained in their chair manufactory situated, &c.," was held to cover property of the same kind in an engine house, ten feet from the main building, connected by a platform and belting.¹ An insurance of "goods shipped on board the Great Western Steamship Company" covers a shipment on a vessel chartered by the company though not owned by it.² Otherwise if the charter is only one of affreightment, and the ship remains in the possession and control of others.³ When the insurance was on goods on the *brig Abeona* and the vessel lost on which the goods were was the *schooner Abeona*, no insurance was held to have attached, in the absence of proof that the parties really contemplated the vessel on which the goods were and not the vessel described.⁴ An insurance company may bind themselves in a policy on goods already lost, if they express such an intention, as by the words "lost or not lost."⁵ The insurance company may avoid liability for goods included in the policy by mistake; but the evidence must be very clear.⁶ Neither party has a right to change the subject-matter of a policy.⁷ Where the insured took out a policy on certain goods he expected to be shipped to him, and instead other goods were shipped and lost, the insured could recover his premium, for the risk that never attached, but could not apply his policy to the new goods. Where an open policy provides that the specific goods insured shall be indorsed on its back, the secretary of the company has no authority to waive this precedent condition, and a failure to comply with it will render the policy invalid.⁸ A mutual company of New York may insure residents of Canada, and property situated there.⁹

¹ [Liebenstein v. Baltic Fire Ins. Co., 45 Ill. 301 at 302.]

² [Croswell v. Mercantile Mut. Ins. Co., 19 Fed. Rep. 24, 8th Cir. (Minn.) 1884.]

³ [Red Wing Mills v. Mercantile Mut. Ins. Co., 19 Fed. Rep. 115, S. Dist. of N. Y. 1884.]

⁴ [Sea Ins. Co. v. Fowler, 21 Wend. 600 at 603.]

⁵ [Arkansas Ins. Co. v. Bostick, 27 Ark. 539 at 544.]

⁶ [Woodruff v. Columbus Ins. Co., 5 La. Ann. 697 at 699.]

⁷ [Toppa v. Atkinson, 2 Mass. 365 at 370.]

⁸ [Plahto v. Merchants, &c. Ins. Co., 38 Mo. 248 at 258; Schaefer v. Baltimore Mar. Ins. Co., 33 Md. 109 at 117.]

⁹ [Western v. Genesee Mut. Ins. Co., 12 N. Y. 258 at 263.]

§ 421. **Risk ; Property included ; Goods in Trust ; For whom it may concern.** — The words “held in trust” applied to goods insured mean goods with which the assured is intrusted, not goods held in trust in the strict technical sense, — so held that there is only an equitable obligation in the assured, enforceable by subpoena in chancery, but goods with which they are intrusted in the ordinary sense of the word ;¹ and the risk covers the merchandise itself, and not merely the trustee’s interest.² Such insurance without restriction will cover a consignor’s interests.³ But where a general policy upon goods in trust was taken out, and it was represented by the applicant that he desired insurance upon such goods as he should receive from time to time to secure him for advances, it was held that the policy covered only such goods as at the time of the loss he had made advances upon.⁴

Whether the goods insured are held in trust is sometimes a question of not a little difficulty. The following case is of importance upon this point, and well illustrates the distinction between a sale and a bailment : The respondents, who were millers, received wheat from different farmers. The wheat, on receipt, was, with the consent of the farmers, mixed with other wheat, and became part of the millers’ current stock. The millers could at any time grind or sell the wheat so received. The farmers could at any time claim the price of the wheat delivered by each, according to the market price for wheat of like quality, at the time of payment claimed. There was also some evidence that the farmers had the option of claiming an equal quantity of wheat of like quality, instead of the value in money. The millers often made advances to the farmers on the wheat received from them. The farmers, after a certain time, paid a storage-charge to the millers.

The respondents insured the current stock of wheat in their mill with the appellants. In the proposal for insurance

¹ *Hough et al. v. People’s Ins. Co.*, 36 Md. 398 ; *Home Ins. Co. v. Favorite*, 46 Ill. 263.

² *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527.

³ *Johnson v. Campbell*, 120 Mass. 449.

⁴ *Parks v. Gen. Interest Ass. Co.*, 5 Pick. (Mass.) 33.

the respondents answered the question whether the insurance was “for self or in trust, and if in trust, on account of whom?” in these words, — “for selves.”

A condition of the policy was, that goods held in trust must be insured as such, otherwise the policy would not cover them. The mill and stock were destroyed by fire. To an action on the policy, the appellants pleaded that the statement in the proposal was a misrepresentation, the stock having been held by the respondents “in trust for other persons.” On these facts it was held (affirming the judgment of the Supreme Court of South Australia) that the description of the subject of insurance was correct, for that this was not a case of possession given subject to a trust, but of property transferred for value upon special terms of settlement.

A bailment on trust implies that there is reserved to the bailor the right to claim a redelivery of the property deposited in bailment; but wherever there is a delivery of property on a contract for an equivalent in money, or some other valuable commodity, and not for a return of the identical subject-matter in its original or an altered form, this is a transfer of property for value, — a sale, not a bailment.¹

¹ South Australian Ins. Co. v. Randell, 22 L. T. N. S. 843.

CHAPTER XXII.

OF THE LOSS AND ITS ADJUSTMENT.

ANALYSIS.

1.

- § 421 a. *Total loss* of a building is destruction not of the materials but of their specific character as a building. If cost of removal of ruins, preparatory to rebuilding, is more than their value, or cost of repairs more than value when repaired, there is a total loss. Broken leg necessitating destruction of horse, total loss. Plaintiff may recover for partial loss proved, though he sued for a total loss. Loss occurs at the time of the fire. Submerging vessel to extinguish fire.
- § 422. a *life* policy the estimate of the value of what is lost is made by the parties beforehand. In case of a creditor the estimate should coincide substantially with the debt.
- § 422 A. Valued policies. If only part of property put at risk recovery is only *pro rata*.
- § 422 B. Statutes making conclusive as to real estate the value named in the policy.
- §§ 423-423 C. In a *fire* policy unvalued the object is indemnification, and the measure of damages is the value of the property lost, not the cost of replacement. (See also § 424.) The latter must often be referred to, however, in determining the true value lost. Remote damages from interruption of business, loss of prospective rent, &c., cannot be recovered unless specifically insured.
- § 423 A. Method of estimating value and loss. Cost, statements in application, proofs, &c.
- § 423 B. Evidence as to amount of loss. Witnesses, admissions, &c.
- § 423 C. Evidence of fraud.
Burden of proof on amount of loss.
Temporary depression of value not to be taken into account, § 424.
- § 424. Amount recoverable, Lessee, Mortgagor and Mortgagee.
Impost and excise duties.
Creditor's recovery not limited to amount of debt.
Goods in trust. Bailment. Goods sold but not removed.
Partner. Part owner.
Person having several interests. Policy running with the property.
- § 424 A. Extent of damage, not extent of title, the test. Insured may recover for all interests represented by him. Ambiguity resolved against the company.
Rent, Usage. Plaintiff not estopped by proofs repudiated by company. Insurance on one item cannot be diverted to another. If the interest has diminished the insured can in general only recover for the interest he still has.

- § 425. Limitation by special provision.
 Partial loss below the proportion necessary to bring the policy into action. That liability is incurred beyond charter limit no defence to company. See, however, § 430. Pro rating "without reference to liability of other companies." Company only to be liable for what prior insurance does not cover.
- § 426. Repeated losses. Transfer of claim for damages.
- § 427. Apportionment of loss and expenses.
- § 428. Interest. Mode of Payment. Evidence. Set-off.
- § 429. For improper refusal to receive premiums, or renew, or to pay a loss, damages may be had.

2.

- §§ 430-433 A. REBUILDING, or replacement. Sometimes there is a provision for rebuilding in the option of the company, § 430, or for paying a portion of the expense of rebuilding, §§ 423, 426. No right to replace exists unless expressly provided for, § 430. The election must be within a reasonable time, § 430. Company cannot replace in part and pay in part, § 430. The additional value of the new over the old is to be deducted, for the insurers are under no obligation to give more than an indemnity, nor to pay for repairs on the old building, § 431. Removal. Equity. Refusal to permit, § 432, 433. Company may have to replace more than once, § 426. Partial rebuilding. If public authorities interfere so that company cannot rebuild, it must pay the loss, § 433.
- Measure of damages for failure to replace properly, §§ 432, 433, 433 A. Depreciation of property before fire, §§ 433 A, 431. Right of reversioner or life tenant to have insurance applied to repair, § 433 A. Order of incumbrances not changed by using insurance to repair, § 433 A.
- Assent to an order to pay to assignee in case of loss does not deprive the company of the option to rebuild, § 447.

3.

- § 434. CONTRIBUTION. Where several insurers protect the *same interest* in the same property, as there is only one loss and can be but one indemnity, they must share proportionally up to the limit of liability, 434. If one company has restricted its liability and another has not, the latter may have to pay more than its proportional share according to the rates specified for apportionment in the policies, §§ 435, 438.
- § 435. Double insurance. Identity of risk. See also §§ 436 a, 437.
- §§ 436-436 a. Floating policy, specific insurance.
- § 438. Average.
- § 439. Reinsurance. Void policy.
- § 440. Generally a life may be insured any number of times, but where the interest in it has an ascertainable value the above rules apply.

CH. XXII.] OF THE LOSS AND ITS ADJUSTMENT.

- § 441. Life and accident insurance combined.
 § 442. Payment of life policy in mistaken belief of death may be recovered.
 § 443. Fraudulent overvaluation of property is a complete defence.
 § 444. Lost policy. No bond of indemnity can be required by the company.

4.

§§ 445-452. WHO MAY SUE.

- Nominal and real claimants. A. insuring in his own name the property of B. for B.'s benefit. Extrinsic evidence as to where proceeds should go, § 445. Heir, § 445. Administrator, §§ 445, 448. Unless the heirs are named, only the executor can sue, § 447 B.
 Payable in case of loss to B, §§ 446-447. Beneficiary sue in his own name, § 446.
 In case of assignment, §§ 447, 448.
 Agent. Policy on goods "in trust" or "for whom it may concern." Real party in interest must sue in Iowa, § 448.
 Mortgagor and mortgagee. Claim on proceeds, and which may sue, § 449.
 Creditor cannot sue on policy payable to him "as his interest may appear," § 447 A, unless his interest is more than the insurance, § 449, for the action cannot be split.
 Too many plaintiffs. Policy to A. and B., real interest all in A, § 447 A.
 Only the person named in the policy can sue, unless it imports the assurance of others, as by the phrase, "whom it may concern," &c., § 447 B.
 Only the covenantee can sue on a policy under seal, § 447 B.
 Dismissal of suit because in wrong name no bar to another, § 447 B.
 Suit against president and secretary sufficient, § 447 B.

5.

§§ 449-452 B. TO WHOM THE PROCEEDS BELONG. See chap. xx.

- General Rule. Only nominal assured or assignee after loss can claim any part of proceeds from company, or person receiving fund unless by agreement, or policy covered property in which he had an interest, and it was affected with his benefit in view, and at his expense. See middle of § 456.
 Creditor must account for proceeds beyond debt and expenses, if premiums came out of debtor, § 449. See § 456, near end. (He ought to account any way, and on payment of debt and expenses of the policy, the debtor ought always to be able to demand its assignment to himself.)
 Vendor and vendee, §§ 450, 456.
 Mortgagor and mortgagee, §§ 449, 452 B-452 D, 456, 457 C. See chap. xxiii. and anal. A (4).
 mortgagee no claim on mortgagor's insurance except by agreement, or an instrumentality in procuring it, § 449.

covenant to insure for mortgagee's benefit, § 452 C.
policy payable to mortgagee, how affected by acts of
mortgagor, § 452 D. See §§ 378 A, 379, 381, 386.
insurance by mortgagee is for *indemnity*, and after
debt is satisfied the excess goes to the mort-
gagor, § 452 B.

Contra, § 449.

unless there is an agreement to that effect,
or the mortgagor was concerned in the
insuring.

the doctrine of § 452 B is just, but the fact that pre-
miums have been paid must be taken into ac-
count in determining what is an indemnity.

Landlord and tenant, § 450.

Lessor and lessee, § 456.

Carrier's right to claim proceeds, § 457 A, 457 B. See ch.
xxiii. and anal. A (4).

Wife insuring her life for husband, or children, § 451.

Endowment policy payable in alternative, § 452.

Payment of premiums gives no right to proceeds, § 452 A.

Insured is to retain no more of the fund than covers his
interest, § 452 A.

Loss after succession goes to heir or devisee.

Administrator recovers as trustee, § 452 A.

Wife's life estate by marriage contract not a "succession,"
§ 452 A.

Equitable owner against garnishment of legal owner,
§ 452 A.

One interested may recover from another who has received
the whole fund, unless it is primarily for the latter's
benefit and no more than covers his own interest,
§ 452 A.

Holder of mechanic's lien, § 456, u.

Builder no claim on buildee's insurance before house is
complete, § 452 A.

Equity will secure vendor the purchase-money out of
vendee's insurance, § 452 A.

Vendee's claim, on completing purchase after fire, § 450.

Tenant in common, § 452 A.

Legatee no claim, where testator and goods perish at sea,
it being unknown which went first, § 452 A.

"For owners," or

"*Whom it may concern*," lets in all really interested at
the time of insurance and of loss, who were intended
to be insured by the person procuring the policy, and
who gave authority for the insurance or ratified it,
and parol is admissible to show who are the owners,
§ 452 E.

§ 452 F.

Adjusting Claim, Compromise, &c.

adjustment fairly made conclusive, if the facts were actu-
ally known (English case *contra*), though the parties
mistook their legal rights.

facts not considered may afterward avail, unless merely cumulative in an unimportant degree.

if the assured knowing his rights is frightened into an unjust settlement, there is no help for him.

yielding part of claim is sufficient consideration for promise to pay the rest, but is not binding on the assured unless the claim is doubtful, or there is some consideration for reducing his claim.

performing conditions prescribed is a good consideration for the promise attached to them.

fraud vitiates the adjustment.

§ 421 a. **Total Loss; When it occurs.** — “Total loss,” as applicable to a building, means not that the materials of which it is composed were annihilated, but that the building, though some part of it may remain standing, has lost its identity and specific character as a building, and instead thereof has become a disintegrated mass, or so far disintegrated that it cannot be properly designated as a building.¹ [A total loss does not mean an absolute extinction, but only a destruction of a thing in the character in which it is insured. If a building ceases by fire to be such, losing its identity and character as a building, the whole sum insured is due although the materials may not have been absolutely destroyed.² When no portion of the brick walls of a house could be used in rebuilding after a fire, when the foundations were not sufficient to support a building of the weight and dimensions of the one burned, when the expense of removing the fragments of the old building would at least equal the value of all the materials left after the fire, — it was held a “total loss” within the meaning of such a policy.³ So where the insurers were to pay only the *absolute* damages, and the cost of repairing, the ship was proved to be more than it would be worth when repaired, the company was liable as for a total loss.⁴ Annihilation of the

¹ Williams v. Hartford Fire Ins. Co. (Cal.), 9 Ins. L. J. 447; Nave v. Home Mut. Ins. Co., 37 Mo. 430. See also Walker v. Queen Ins. Co., 127 Mass. 306; Judah v. Randall, 2 Caines, Cases, 324; Insurance Co. v. Fogarty, 19 Wall. (U. S.) 640, 644; Globe Ins. Co. v. Sherlock, 25 Ohio St. 50.

² [H. & B. Ins. Co. v. Garlington, 66 Tex. 103.]

³ [Harriman v. Queen Ins. Co., 49 Wis. 71 at 85; Seyk v. Millers' Nat. Ins. Co., 74 Wis. 67 (walls useless as such and most of the bricks spoiled).]

⁴ [Forwood v. North Wales Ins. Co., 9 Q. B. D. 732; Troop v. Jones, 5 Russ. & Geld. (Nova Sco.) 230.]

vessel is not necessary to constitute a total loss; it is sufficient if the owner lose his rights in the vessel by sale under a decree of a court of competent jurisdiction in consequence of a peril insured against, and in such a case no notice of abandonment is necessary.¹ If a competent veterinary surgeon orders the destruction of a horse that has broken his leg, the company is liable for a total loss.^{2]}

The doctrines, which have obtained in marine insurance of constructive total loss and abandonment,³ salvage, and general average, are not applicable in fire insurance. Though a vessel insured against fire be submerged to extinguish the fire, the insurer is not liable for any portion of the expense of submerging, raising, discharging, and reloading cargo, and damages to property not insured, but only to such damages as result from the fire to the subject-matter insured.⁴ [When a total loss is claimed on a marine policy, extinction either physical or of value must be proved.⁵ In another case it was said that to constitute a total loss there must be a destruction of the article in specie, not merely in value.⁶ Insurance against a "total loss only" does not cover a case where the ship was repaired and a part of the cargo saved.^{7]}

Loss occurs at the time of the fire, and not when an award is made, or when the time has expired within which payment is to be made.⁸ [In an action for a total loss the plaintiff may nevertheless recover for a partial loss.^{9]}

§ 422. **Amount of Loss recoverable; Life.** — Under the usual contract of life insurance, the loss being total and the policy

¹ [Cossman v. West, 13 App. Cas. 160.]

² [Shiells v. Scot. Ass. Corp., 26 Scot. L. R. 702.]

³ [A contract of insurance is only one of indemnity for actual loss, and the consignee of goods in transit has no right to abandon them to the insurance company, and claim the whole insurance except in case of total loss. Hicks, Lightle & Co. v. Mc Gehee, 39 Ark. 264.]

⁴ Merchants', &c. Transportation Co. v. Associated Firemen's Ins. Co. (Md.), 9 Ins. L. J. 461. See also *post*, §§ 423, 428, 431, 435.

⁵ [Young v. Pacific Mut. Ins. Co., 2 Jones & Sp. 321 at 331.]

⁶ [Hugg v. Augusta Ins. &c. Co., 7 How (710) 595 at 606, Marine Ins. (U. S.)]

⁷ [Murray v. Hatch, 6 Mass. 465 at 477.]

⁸ Johnson v. Humboldt Ins. Co., 91 Ill. 92.

⁹ [Gardiner v. Croasdale, 2 Burr. 904 at 907; King v. Walker, 2 H. & C. 364, 399.]

valued, the question of the amount payable is not open to debate, the amount being fixed by the contract. And the amount to be paid in case of loss may be any sum which the parties may agree upon, as the value of a life may be fixed at any sum, unless, perhaps, it be so large and so disproportional to any possible interest as to raise the presumption that the transaction is not in good faith, but in reality is a gambling speculation. When the insurance is upon one's own life, as the future earnings may be indefinitely large, the insurance may be to an unlimited amount, except as above stated. Though where the insurance is by a creditor on the life of a debtor, the amount should doubtless coincide substantially with the amount of the indebtedness.¹

[§ 422 A. **Valued Policy.** — In a valued policy the stipulated value must always be the amount of recovery in case of total loss,² though it exceed their market value at the place of destination.³ But if by mistake or design the assured should put on board a ship only a part of the goods to which he intended the valuation to apply, he cannot recover as if the whole subject-matter of the valuation had been put on board, but only such a proportion of the valuation as the goods which were on board, and at risk, should bear to the whole valuation.⁴ And wherever a part of the property covered by the valuation is not put at risk and covered by the policy, the recovery will be proportional, not entire.⁵]

[§ 422 B. **Statutes making Value named in Policy conclusive.** — In Wisconsin the law makes the value of real estate written in the policy conclusive as to the amount of loss, and no evidence that the figures were knowingly too high is admissible as a defence to an action on the policy.⁶ In the case of

¹ See *Mitchell v. Union Life Ins. Co.*, 45 Me. 104.

² [*Lovering v. Mercantile Mar. Ins. Co.*, 12 Pick. 348 at 367; *Whitney v. Amer. Ins. Co.*, 3 Cowen, 210 at 219; *Davy v. Hallett*, 3 Caines (N. Y.), 16 at 20.]

³ [*Forbes v. Manufacturers' Ins. Co.*, 1 Gray, 371 at 375.]

⁴ [*Wolcott v. Eagle Ins. Co.*, 4 Pick. 429 at 436.]

⁵ [*Patrick v. Eames*, 3 Camp. 441 at 442; *Le Pyre v. Farr*, 2 Vernon, 716 at 716; *Tobin v. Hartford*, 17 C. B. n. s. 527 at 532.]

⁶ [§ 1943 R. S.; *Cayon v. Dwelling-House Ins. Co.*, 68 Wis. 510; *Seyk v. Miller's Nat. Ins. Co.*, 74 Wis. 67.]

several policies in different companies the aggregate of the insurance is the value.¹ This provision of the law cannot be changed by stipulations in the policy,² nor by an award of arbitrators for a less amount.³ By statute in Texas also a stipulation that only a proportion of the amount insured shall be paid by each company is of no effect as to *real estate*. The whole sum insured must be paid by each company.⁴]

§ 423. **Amount of Loss recoverable; Fire; Salvage.** — The general rule of damages in fire insurance, the policy not being a valued one, is indemnification of the insured if the loss be less than, or only equal to, the amount of insurance specified in the policy, without reference to the relation of the amount insured to the whole value of the property insured; and in this loss is included all the loss immediately caused by the fire, and notwithstanding the insurance is in excess of the proportion allowed by the by-laws of the company,⁵ so that the insured may be paid for whatever he had before the fire and was destroyed thereby. If there be successive losses, the payment on a prior loss is to be deducted from the amount insured, and the balance, or so much as will indemnify, is to be paid on the subsequent loss.⁶ The rule of damages is the value of the property lost, and not the cost of replacement.⁷ A stipulation that after the fire the insured shall put the partially damaged goods in as good condition as the case will allow, has no application where the value of goods totally destroyed amounts to the sum insured.⁸ Remote and consequential damages, however, such as are caused by an interruption of business, — as the loss of custom to an

¹ [Oshkosh G. L. Co. v. Germania Fire Ins. Co., 71 Wis. 454.]

² [Reilly v. Franklin Ins. Co., 43 Wis. 449 at 456.]

³ [Thompson v. Citizens' Ins. Co., 45 Wis. 388 at 389.]

⁴ [Queen Ins. Co. v. Jefferson Ice Co., 64 Tex. 578.]

⁵ Underhill v. Agawam Mut. Ins. Co., 6 Cush. (Mass.) 440; Cumberland, &c. Ins. Co. v. Schell, 29 Pa. St. 31; Peddie v. Quebec Fire Ins. Co., 1 Stuart (L. C.), 174; New York Gas Light Co. v. Mechanics' Mut. Fire Ins. Co., 2 Hall (N. Y. Superior Ct.), 108.

⁶ Curry v. Com. Ins. Co., 10 Pick. (Mass.) 535, *post*, § 426.

⁷ Steward v. Phoenix Ins. Co., Sup. Ct. (N. Y.), 8 Alb. L. J. 285; s. c. 5 Hun, 261.

⁸ Williamson v. Hand-in-Hand Mut. Fire Ins. Co., 26 U. C. (C. P.) 266.

inn,¹ or the loss of use of a grist-mill, or the profits of its business, or the expenses of keeping his employees while rebuilding, though in consequence of the fire no return can be had for the wages, — are not recoverable as damages.² And this was held upon general principles, following the authority of Wright and Pole. But in both cases there was a clause which permitted the insurers to make good the loss by repairing if they should so choose, which in the opinion of the court conclusively showed that nothing more than the expense of repairing could be recovered. Neither is the loss of prospective rent recoverable as damages by fire.³ But all these several subjects may be specifically insured when, of course, their loss becomes an element of damage.⁴ The expense of repairing or rebuilding, it has been said, however, is not the measure of damages, since that would give the insured more than he would be entitled to, as having new instead of old. And as there is not in fire insurance, as in marine, a rule of allowing one-third for the difference between new and old, it is for the jury to determine how much money will make good to the insured his loss.⁵ And this is recoverable if within the amount insured, although the value of the property insured is much greater than the loss. The proportion of the loss to the whole amount insured is not in fire, as in marine, insurance an element in the calculation of the amount to be paid.⁶ If the insured is “to contribute a certain proportion of the expense of rebuilding,” the proportion is of the value to the estate, not the cost of rebuilding.⁷ The fact that the article to be replaced is patented is not to enhance its value above the cost of replacing.⁸ In *Morrell v.*

¹ *Wright & Pole*, 1 Ad. & El. 621; s. c. 3 Nev. & Man. 819, under the name of *Sun Fire Office v. Wright*.

² *Menzies v. North Brit. Ins. Co.*, 9 Ct. Sess. Cas. 2d series (Scotch), 694; *Niblo v. N. A. Fire Ins. Co.*, 1 Sandf. (Superior Ct. N. Y.) 551.

³ *Leonarda v. Phoenix Ass. Co.*, 2 Rob. (La.) 131.

⁴ See all the above authorities.

⁵ *Brinley v. Nat. Ins. Co.*, 11 Met. (Mass.) 195; *post*, § 431.

⁶ *Miss. Mut. Ins. Co. v. Ingram*, 34 Miss. 215; *Liscom v. Boston Mut. Ins. Co.*, 9 Met. (Mass.) 205.

⁷ *Commonwealth Ins. Co. v. Sennett*, 37 Pa. St. 205.

⁸ *Ibid.*

Irving Fire Insurance Company,¹ it is said that the exercise of the option to rebuild converts the insurance contract into a contract to rebuild, and in a suit for damages for the imperfect performance of the new contract, the amount of insurance is no criterion of damages. And in such case an action on the policy cannot be maintained to recover the loss.² A stipulation that "in case of the removal of property to escape conflagration the company will contribute ratably with the insured and other companies interested to the loss and expense of such act of salvage," does not affect the question of loss by fire. The insured is still to recover his whole loss if the insurance amounts to so much, and this provision applies only to the loss and expense of removal.³ But if such loss is to be borne by insurers and insured in such proportion as the whole sum insured bears to the whole value of the property insured, then each bears the same proportion of the loss that his interest bears to the whole value of the property insured.⁴

[§ 423 A. **Estimating Value.** — The valuation in the policy does not control, nor the cost of rebuilding, but the money value at the time of the fire.⁵ The value assigned by the plaintiff and another person for the purposes of insurance is not evidence of the cash value of the pictures insured.⁶ Nor is the assured limited by the valuation put upon the property by the magistrate's certificate. He may prove by witnesses the true value. Even the sworn statement of the assured himself has been held not to estop him.⁷ Preliminary proofs are not competent evidence of value, but mere *ex parte* statements.⁸ The "actual cash value" of goods is the fair and

¹ 33 N. Y. 429.

² *Beals v. Home Ins. Co.*, 36 N. Y. 522, affirming s. c. 36 Barb. (N. Y.) 614. But see *post*, § 432.

³ *Thompson v. Montreal Ins. Co.*, 6 U. C. (Q. B.) 319.

⁴ *Peoria, &c. Ins. Co. v. Wilson*, 5 Minn. 53.

⁵ [*Waynesboro Fire Ins. Co. v. Creaton*, 98 Pa. St. 451; *Standard Fire Ins. Co. v. Wren*, 11 Brad. 243; *Schroeder v. Trade Ins. Co.*, 12 Brad. 651.]

⁶ [*Linde v. Republic Fire Ins. Co.*, 50 N. Y. Super. 362.]

⁷ [*Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329.]

⁸ [*Farrell v. Aetna Fire Ins. Co.*, 7 Baxt. (Tenn.), 542 at 544.]

reasonable price for which they can be sold in the market.¹ One of the facts the jury may consider in estimating the value of articles that have no market value is the cost of them to the party claiming the value.² Such a price is in the nature of an admission by the plaintiff. Where the plaintiff testified that she paid \$3500 for certain property, and its value was so stated in the application, the jury are warranted, in the absence of other evidence, in finding its value at that figure.³ When the insured property (as a horse, sold first for \$500, and then for \$1200) has no distinctly recognized market value, the jury will be instructed to find the *fair* value.⁴ The prime cost of a vessel is not conclusive of her real value against the assured.⁵ The measure of damages on grain lost while in charge of a common carrier is to be determined according to its price at the place of disaster, when the policy provided that damage was to be estimated according to the value of the property at the time of loss.⁶ The assured should receive for a lost building "the value of it as it stood on the day it was destroyed, as compared with a new building of the same kind and dimensions." It is not proper to ask witnesses what the whole property was worth, and what the land without the buildings is worth, for the circumstances may be such that the land is worth as much without any building as with the old one.⁷ Although the insured has sold the land under the buildings, retaining the right of removal, he is entitled to recover their full value at the time of loss, and not merely their value for purposes of removal.⁸

[§ 423 B. *Evidence of Value; Witnesses; Admission, &c.* — Upon a question of value the opinion of a witness, who has seen the thing in question and is acquainted with the value of

¹ [Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329.]

² [Sturm v. Williams, 6 J. & S. (N. Y. Super.) 325 at 344.]

³ [Siltz v. Hawkeye Ins. Co., 71 Iowa, 710.]

⁴ [Gere v. Council Bluffs Ins. Co., 67 Iowa, 272.]

⁵ [Snell v. Delaware Ins. Co., 4 Dallas (U. S.), 430 at 432.]

⁶ [Savage v. Corn Exchange Ins. Co., 36 N. Y. 655 at 659.]

⁷ [Ætna Ins. Co. v. Johnson, 11 Bush, 587 at 591.]

⁸ [Washington Mills E. Manuf. Co. v. Commercial Fire Ins. Co., 13 Fed. Rep. 646, 1st Cir. (Mass.), 12 Ins. L. J. 181.]

similar things, is not incompetent to be submitted to a jury.¹ But opinions of witnesses not experts, as to the probable amount of damages are not admissible.² A farmer who has been in the insured store several times and was there the day before the fire, cannot be asked "what amount of goods were in the store at the time of the fire according to his estimate." He had had no experience *in the business*, and a witness can only testify to a question of value when he is shown to be competent to form an opinion.³ Manufacturers familiar with the plaintiff's factory before the fire may testify to its value.⁴ The testimony of persons experienced in selling and estimating the value of such goods as the plaintiff sold, will be received on the question of loss, in corroboration of the plaintiff whose books and papers have all been burnt.⁵ A daughter of the assured who bought many of the articles destroyed and who was present when the rest were bought, is a good witness to prove their value.⁶ The admission of the insured and the testimony of a drayman familiar with the stock are competent.⁷

[§ 423 C. *Evidence of Fraud; Burden of Proof as to amount of Loss.* — The facts that the property was bought at a bankrupt sale, for \$3500, and that various witnesses estimate its value at from \$12,000 to \$20,000, do not show fraud in a claim for \$15,000.⁸ An instruction putting the burden of proof on the defendant to show that the loss is less than the full amount of the policy is wrong. It is incumbent on the plaintiff to aver and prove his loss.⁹]

§ 424. **Loss; Amount recoverable; Lessee, Mortgagor; Impost and Excise Duties; Mortgagee; Goods in Trust; Partner.** — Where a building which stood on leased land was de-

¹ [Clark v. Baird, 9 N. Y. 183 at 196.]

² [Norman v. Wells, 17 Wend. 136 at 164.]

³ [Teerpenning v. Corn Exch. Ins. Co., 43 N. Y. 279 at 283.]

⁴ [Reed v. Washington Ins. Co., 138 Mass. 572.]

⁵ [Insurance Co. v. Braden, 96 Pa. St. 81.]

⁶ [Continental Ins. Co. v. Horton, 28 Mich. 173 at 175.]

⁷ [Livings v. Home Mut Fire Ins. Co., 50 Mich. 207.]

⁸ [McGibbon v. Imperial Fire Ins. Co., 2 Russ. & Geld. (Nova Scotia) 6.]

⁹ [German Fire Ins. Co. v. Gunten, 13 Brad. 593; Carlwitz v. Germania Fire Ins. Co., 12 Ins. L. J. 127, 3d Cir. (N. J.), 1883.]

stroyed, and the lease expired within a few days, so that the building must be removed or forfeited, or a new lease entered into, it was held that the intrinsic value of the building was the amount recoverable, without reference to the special circumstances.¹ So where lessees held machinery, &c., which they were to return in good order and condition at the end of the lease, and their "working interest" therein was insured, their interest is not the value of the use from the time of the fire to the expiration of the lease, but the value of the property they were bound to replace.² Where a mortgagee insured had agreed to sell and assign certain mortgages, and had received certain payments from the assignee, before the loss by fire, he was held, nevertheless, to be entitled to recover from the insurers the actual loss without deduction on account of these payments.³ So where property has been taken for public use by the public authorities, or sold under a binding contract for a conveyance, no actual conveyance having been made.⁴ So where one who holds a power of attorney to sell for advances made, though the legal title be in another.⁵ So a mortgagor whose equity has been seized on execution recovers according to the value of the property lost, without reference to this circumstance.⁶ But where a leasehold interest is insured, the value of the unexpired lease is the measure of damages.⁷ Goods in store or in the custom-house are to be estimated at their market value, without reference to the cost, or to the fact that the duties may not have been paid.⁸ The measure of damages is neither the value of convenience nor of affection nor the cost price, but its fair cash value in the market, to be determined by what

¹ *Laurent v. Chatham Fire Ins. Co.*, 1 Hall (N. Y. Superior Ct.), 41.

² *Imperial Fire Ins. Co. v. Murray*, 73 Pa. St. 13.

³ *Haley v. Manuf. Fire Ins. Co.*, 120 Mass. 292.

⁴ *Collingridge v. Royal, &c. Ins. Co.*, L. R. 3 Q. B. D. 173; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454.

⁵ *Brugger v. State, &c. Ins. Co.*, C. Ct. (Oregon), 8 Ins. L. J. 293.

⁶ *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40.

⁷ *Niblo v. N. A. Ins. Co.*, 1 Sandf. (N. Y. Superior Ct.) 551.

⁸ *Wolfe v. Howard Ins. Co.*, 1 Sandf. (N. Y. Superior Ct.) 124; s. c. affirmed, 3 Seld. (N. Y.) 583.

similar property at the same time, and in the same or similar places and under the like circumstances, would ordinarily bring in the general market, without regard to an extraordinary price, whether higher or lower, which might be obtained in special cases or under special circumstances.¹ It is a sum equal to the value of the property which has been lost, not what it would cost the insured to replace, repair, or rebuild, as that might be more or less than the actual loss, from the peculiar facilities or disadvantages of the insured.² And it has been held that a depression in value caused by special circumstances, which may be temporary only, is not to be taken into account.³ Where distilled liquors ready for market, but upon which the internal revenue tax was not paid, were destroyed, it was held that as the duty had not been paid, and the destruction left the owner without any personal liability to the government for the tax, though while the property was in existence there was a lien upon it in favor of the government, the insured could only recover the value of the property destroyed, less the tax.⁴ A mortgagee insuring his own interest, at his own expense and on his own indemnity, recovers according to his interest at the time when he commences his suit,⁵ or perhaps more accurately at the time of the loss. That after the loss the mortgagor replaces the property in as good condition as it was before, or the mortgagee, by selling other securities which he holds, reduces his debt, however it may affect the equities between him and the mortgagor, does not affect the terms of the contract between the mortgagee and the insurers. The contingency having arrived upon which the loss was payable, it must be paid

¹ *Mack v. Lancashire Ins. Co.*, C. Ct. (Mo.), 9 Ins. L. J. 681; *Equitable Fire Ins. Co. v. Quinn*, 11 L. C. 170; *post*, § 428; *Fowler v. Old North State Ins. Co.*, 74 N. C. 89; *Wynne v. Liverpool, &c. Ins. Co.*, 71 N. C. 121.

² *Rousseau c. La Confiance*, Dalloz, Jur. Gén., 1870, 1, 280.

³ *McCraig v. Quaker City Ins. Co.*, 18 U. C. (Q. B.) 130. But a later case in Lower Canada would seem to be to the contrary. *Grant v. Ætna Ins. Co.*, 11 L. C. 128.

⁴ *Security Ins. Co. v. Farrell*, Sup. Ct. (Ill.), 2 Ins. L. J. 302; *Bobbitt v. Liv., &c. Ins. Co.*, 66 N. C. 70.

⁵ *Sussex County Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541.

according to the status of the interest at the time when the contingency happened; nor can the insurers require the mortgagee first to exhaust his remedy against the mortgagor before calling upon them for indemnity.¹ To indemnify the mortgagee for all loss to property means to the amount of his interest;² but to make good to the assured all loss to property gives the right to recover the full amount of loss.³ But a mortgagee can only recover on an insurance of his own interest the amount due on the mortgage when the insurance was effected. He cannot include subsequent advances, although the insurance before such loss as may happen not exceeding a certain sum, and the amount of advances, be within that sum.⁴ So where an insured vendor has received part of his purchase-money before the loss,⁵ the insurers have no claim either against the vendee, or rights against the property sold.⁶ And that the property still held by the mortgagee is ample security for the debt is of no avail to the insurers.⁷ Nor, where the policy is assigned for the benefit of creditors, is the amount recoverable limited to the amount of the debts.⁸ And a commission-merchant or bailee insuring goods, his own as well as in trust or on commission, the insurers agreeing to pay the "actual value" or "all damage," may recover the full

¹ *Foster v. Eq. Mut. Fire Ins. Co.*, 2 Gray (Mass.), 216; *Carpenter v. Washington Ins. Co.*, 16 Pet. (U. S.) 495; *Excelsior Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 348, criticising and denying *Flanders on Insurance*, p. 360, *Angell on Insurance*, § 59, and *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253; *Ætna Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, and *dictum* in *Carpenter v. Providence Ins. Co.*, 16 Peters (U. S.), 495, per Story, J., apparently to the contrary; *Bank of New South Wales v. Royal Ins. Co.*, 9 Ins. L. J. 930. *Contra*, *Mathewson v. Western Ass. Co.*, 10 L. C. 8. See also *Honore v. Lamar Ins. Co.*, 51 Ill. 409.

² *Sharswood, J.*, in *Thornton v. Enterprise Ins. Co.*, Sup. Ct. (Pa.), *Legal Int.*, p. 170, June 14, 1872. The soundness of this distinction is doubtful.

³ *Insurance Co. v. Updegraff*, 21 Pa. St. 513.

⁴ *Ogden v. Montreal Ins. Co.*, 3 U. C. (C. P.) 497.

⁵ *Insurance Co. v. Updegraff*, 21 Pa. St. 513; *Boston & Salem Ice Co. v. Royal Ins. Co.*, 12 Allen (Mass.), 381.

⁶ *Ibid.*

⁷ *Kernochan v. New York Bowery Ins. Co.*, 5 Duer (N. Y. Superior Ct.), 1; s. c. affirmed, 17 N. Y. 428; *Rex v. Insurance Co.*, 2 Phila. Rep. (Pa.) 357; *post*, §§ 456, 457.

⁸ *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256, 266.

amount of loss,¹ but not unless they are so insured, if the policy require it.² So may a warehouseman insuring goods "in trust" recover the whole amount of loss on goods on storage.³ A person having goods in his possession as consignee, or on commission, may insure them in his own name, and in the event of loss recover the full amount of the insurance, and, after satisfying his own claim, hold the balance as trustee for the owner.⁴ [But where one obtained a policy on goods in his store and "by him held in trust," he representing that he was in the habit of receiving goods for sale and making advances upon them, the insurance being intended to secure his advances, it was held that it only covered his and not the consignor's interest in the goods.⁵ A part owner insuring in his own name only, not mentioning any other interested persons, can recover only the amount of his own interest.⁶ A person having two interests in the same property may recover according to both or either, when the

¹ *De Forest v. Fulton Fire Ins. Co.*, 1 Hall (N. Y. Superior Ct.), 84; *Lee v. Howard Fire Ins. Co.*, 11 Cush. (Mass.) 324; *Millaudon v. Atlantic Ins. Co.*, 8 La. 557.

² *Brichta v. New York Lafayette Ins. Co.*, 2 Hall (N. Y. Superior Ct.), 374; *Keely v. Insurance Co.*, 1 Phila. (Pa.) 175; *Getchell v. Ætna Ins. Co.*, 14 Allen (Mass.), 325. In *Franklin Fire Ins. Co. v. Hewitt*, 3 B. Mon. (Ky.) 231, it was held that a description of the property insured by commission-merchants as "theirs," if known by the insured to be held by them on commission, was sufficient within the condition that goods on commission must be insured as such.

³ *Waters v. Monarch Fire & Life Ins. Co.*, 5 E. & B. 870; *Hough v. People's Ins. Co.*, 36 Md. 398; *London, &c. Railway Co. v. Glyn*, 1 E. & E. 652; *Siter v. Morris*, 13 Pa. St. 218.

⁴ *Hough et al. v. People's Ins. Co.*, 36 Md. 398. [In case of a policy covering pianos, &c., owned or "held in trust," a piano stored with the insured may be recovered for to its full value, and the bailee after satisfying his own charges would hold the remainder for the true owner of the instrument. *Lucas v. Insurance Co.*, 23 W. Va. 258.] Property held "in trust," within the meaning of a policy of insurance, unless specially defined, as was the case in *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176, includes everything in which the insured has only a qualified interest with the possession, while the ownership is in another. *Turner v. Stetts*, 28 Ala. 420; *Stillwell v. Staples*, 19 N. Y. 401; *ante*, § 78, note, *sub finem*, and § 421

⁵ [Parks v. Gen. Interest Ins. Co., 5 Pick. 34 at 35, 38.]

⁶ [Finney v. Warren Ins. Co., 1 Met. 16 at 18; *Dumas v. Jones*, 4 Mass 647 at 651.]

interest insured is not indicated in the contract.¹ Where the interest of the insured has diminished he can recover only indemnity for the loss of the interest he still has.²]

Under a policy which insures goods "sold but not removed," the insurer may recover for the benefit of the real owners, although the goods after the policy is issued are sold and delivered, and the title and right of possession have passed, if the location of the property has not been changed. Such a policy must intend that the risk taken should cover and adhere to the same property, after it had left the ownership of the insured named therein, and follow it while in the ownership of the vendee of the original owner, so long as it is not removed. The law does not forbid that a policy should be so framed as that the insurance shall be inseparably attached to the property covered thereby, so that successive owners, if it appear that such successive owners were within the intentions of the contracting parties during the continuance of the risk, shall become in turn the parties really insured.³ The survivor of a partnership dissolved by the death of one of the firm, can recover only the balance of the goods that belonged to the firm at the time of dissolution, and were in his hands as survivor at the time of the loss. Goods bought after the dissolution are not covered by the policy, unless by special agreement.⁴

[§ 424 A. *The amount recovered* may be more than the damage to the interest of the insured. If, for example, a policy to a husband on property owned by his wife covers the entire ownership, the whole loss up to the amount of the policy may be recovered. The assured may recover for damage to all interests, so far as insured, represented by him, whether by precedent authority or subsequent ratification of others.⁵ In the absence of fraud, mistake, or agreement to the contrary, if the assured has an insurable interest at the time the policy is obtained,

¹ [White v. Hudson River Ins. Co., 7 How. Pr. 350.]

² [Monroe v. Southern Mut. Ins. Co., 63 Ga. 669]

³ Waring v. Indemnity Fire Ins. Co., 45 N. Y. 606.

⁴ Wood v. Rutland Ins. Co., 31 Vt. (2 Shaw) 552. In Macarty v. Com. Ins. Co., 17 La. 365, it was said that a donor *inter vivos*, reserving rents and profits during life, could not recover anything, having no interest. But see *ante*, § 85.

⁵ [Trade Ins. Co v Barraciff, 45 N. J. 543]

and also at the time of the loss, he may recover, (whether that interest is a title in fee for life or merely equitable) the whole amount of damage done to the property not exceeding the amount for which he is insured.¹ The construction most favorable to indemnity will be adopted.² In this case the mortgagee was to be paid "such proportion of the sum insured as the damages by fire to the premises mortgaged shall bear to their value immediately before the fire," and it was held that "premises mortgaged" referred to so much of the mortgaged premises as was insured, that is, the main building, and did not refer to the entire lot mortgaged and other buildings thereon. Wherefore as the main building was totally destroyed, and was equal in value to the whole sum insured, this should be paid to the mortgagee. A policy stipulated to pay \$150 on proof of death, "one-third only of the above sum payable if death occur after three months and within six months from date, two-thirds only if death occur after six months and within a year; and the full amount only if death occur after one year." The insured died within three months, and the company was held liable for the full amount, on the principle that an ambiguous policy is to be construed against the company.³ Three judges dissented without stating reasons, which indeed it was hardly necessary to do, they are so clear. The policy states as clearly as words can be put together that the company is to be liable for the full amount only if death occur after a year has passed. The company should not have been held for more than one-third of the amount, at any rate. A lessee who has insured his interest may recover the amount of rents which would have come to him on sub-leases but for a fire.⁴ Insurance on specific items not absorbed cannot be diverted to other items where the loss is not fully covered.⁵

¹ [Andes Ins. Co. v. Fish, 71 Ill. 620 at 625, and cases cited; Caldwell v. Stadacona Fire & Life Ins. Co., 11 Can. Supr. Ct. 212 (life tenant, full value so far as insurance will cover it).]

² [Teutonia Ins. Co. v. Mund, 102 Pa. St. 89]

³ [Metropolitan Life Ins. Co. v. Drach, 101 Pa. St. 278]

⁴ [Carey v. London Provincial Fire Ins. Co., 33 Hun, 315.]

⁵ [Carlwitz v. Germania Fire Ins. Co., 12 Ins. L. J. 127, 3rd Cir. (N. J.) 1883.]

The plaintiff is not estopped by the proofs of loss from recovering a larger amount, if the company has repudiated the liability and refused to act on the proofs.¹ The general law regulating the assessment of damages under a policy must give way to a special custom of the city shown to have been in the minds of the contracting parties.^{2]}

[§ 425. **Loss; Limitation by special Provision; Partial Loss.**—

By special provision of the policy or charter, the amount of loss for which the insurers are to be responsible may be, and often is, limited to a certain percentage or proportion of the value of the property insured. But in such case, if the policy be a valued one, that is, if the value of the property insured be fixed in the policy, that value will be conclusive.³ Restriction is also sometimes made to a certain proportion of the value of the property at the time of the loss.⁴ In such a case the value at the time of loss is open to inquiry though the policy be a valued one. The value at the time of insurance may be more or less than at the fire.⁵ And where the insurers were to pay "all loss or damage," not exceeding the sum insured, "the said loss or damage to be estimated according to the true and actual value of the property at the time the same shall happen, and to be paid at the rate of two-thirds of its actual cash value," it was held that the two clauses, construed together, meant that the insurers should pay two-thirds of the actual value of the property on hand at the time of the fire, not exceeding the sum insured.⁶ But when total losses were to be paid to the amount of two-thirds, and partial losses in full, and out of a stock of \$3929 only about \$70

¹ [Sibley v. Prescott Ins. Co., 57 Mich. 14.]

² [Fulton Ins. Co. v. Milner, 23 Ala. 420 at 427.]

³ Borden v. Hingham Mut. Fire Ins. Co., 18 Pick. (Mass.) 523; Fuller v. Boston Mut. Fire Ins. Co., 4 Met. (Mass.) 206; Holmes v. Charlestown Mut. Ins. Co., 10 id. 211; Phillips v. Merrimack Mut. Ins. Co., 10 Cush. (Mass.) 350; Brown v. Quincy Ins. Co., 105 Mass. 396.

⁴ Brinley v. National Ins. Co., 11 Met. (Mass.) 195; Huckins v. People's Mut. Fire Ins. Co., 11 Fost. (N. H.) 238; ante, § 31.

⁵ Ibid.; Post v. Hampshire Mut. Fire Ins. Co., 12 Met. (Mass.) 555; Egan v. Mut. Ins. Co., 5 Denio (N. Y.), 326; Atwood v. Union Mut. Ins. Co., 8 Fost. (N. H.) 234.

⁶ Ashland Mut. Fire Ins. Co. v. Housinger, 10 Ohio St. 10.

was saved, the court held that this insignificant salvage could not be considered as making the case one of partial loss, whereby the insured would be entitled to recover much more on partial than on total loss. Literally construed, the court said such must be the result. But such could not have been the intent of the parties.¹ When several properties are insured, subject to the restriction as to amount of loss payable on each, it is tantamount to a separate insurance on each.² And where grain was insured, the insurers not to be liable for partial loss unless it amounted to twenty per cent, and was shipped in three barges, one of which was damaged, but not to the amount of twenty per cent of the whole shipment, it was held that no recovery could be had.³ And under a restriction of recovery to two-thirds the value of the property a mortgagee may recover the full value of his interest, if it does not exceed two-thirds of the value of the property insured.⁴ The fact that the property is overvalued, so that the insurers become liable for more than is permissible by their by-laws, will not excuse the company. The violation of the charter is no defence against the insured, there being no fraud.⁵ [If a policy provides for pro-rating "*without reference to the solvency or liability of the other insurers,*" the company will be liable only for its pro-rata share of the loss notwithstanding another company repudiates its policy.⁶ If a policy states that in case there is prior insurance the company will only be liable to the extent that the plaintiff is not indemnified by the prior policies, and it appears that he is thus fully indemnified, the company is not liable at all, and a verdict against it will be set aside.⁷ And when a marine policy declared that if prior insurance had been made the new policy should only attach

¹ Singleton v. Boone County Ins. Co., 45 Mo. 250.

² King v. Prince Edward Ins. Co., 19 U. C. (C. P.) 134; McCulloch v. Gore, & Ins. Co., 32 U. C. (Q. B.) 61

³ Haenschen v. Franklin Ins. Co., 67 Mo. 156.

⁴ Sanders v. Hillsborough Ins. Co., 44 N. H. 238.

⁵ Williams v. N. E. Mut. Ins. Co., 31 Me. 219; Cumb. Val. Mut. Prot. Co. v. Schell, 29 Pa. St. 31. See, however, § 430.

⁶ [Cassity v. New Orleans Ins. Ass., 65 Miss. 49.]

⁷ [Kenny v. Union Mar. Ins. Co., 1 Russ. & Geld. (Nova Sco.) 313.]

so far as the prior one was insufficient to cover the loss, and when the same property was fully insured previously, the policy never attached and the premium must be returned, notwithstanding the fact that a part of the prior insurance was in companies which since making it had become insolvent and dissolved.¹ But when the policy provides that "in case there be any insurance in any other office extending to the property hereby insured, then this company, in case of a loss, will only be liable to pay its ratable proportion of the damage," the clause has reference to other insurance existing at the time of loss, and does not bind the insured to keep alive an insurance existing when the said policy was issued.² Nor does it refer to other insurance invalid in its inception.³

§ 426. **Loss ; Rebuilding ; Repeated Losses ; Transfer of Claim for Damages.** — As this rebuilding is but one mode of payment of the loss, the acceptance of an order to pay the loss to a person other than the assured does not deprive the insurers of their right to make the election. The acceptance is but an assignment of the claim of the insured, without in any way affecting the mode of payment. It is but a substitution of the assignee for the assured, and giving him the right to demand what the assured might have demanded.⁴ And if the insurance be for a specific amount for a given period, and the cost of once repairing be less than the amount insured, the policy will remain good for the unexpended balance during the period covered by the policy.⁵ And it seems that but for the express limitation of the amount for which the insurers might become liable, they would have to replace as often as the property should be destroyed during the period of insurance.⁶ If goods are replaced, the insured is to be made good for his loss, and only that, and any arrangement between the parties

¹ [Ryder v. Phoenix Ins. Co., 98 Mass. 185 at 193.]

² [Lattan v. Royal Ins. Co., 45 N. J. 453.]

³ [Jersey City Ins. Co. v. Nichol, 35 N. J. Eq. 291.]

⁴ [Tolman v. Manufacturers' Ins. Co., 1 Cush. (Mass.) 73.]

⁵ Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535, Crombie v. Portsmouth Mut. Ins. Co., 6 Fost. (N. H.) 389; Trull v. Roxbury Mut. Ins. Co., 3 Cush. (Mass.) 263.

⁶ Ibid.; New Hampshire Ins. Co. v. Rand, 4 Fost. (N. H.) 428.

for an extension of the time within which to replace or repair would control the original contract in this particular.¹

§ 427. **Loss ; Apportionment ; Several Parcels.**—An agreement is sometimes inserted in the policy,² and will sometimes be inferred from the circumstances of the case, for an apportionment of the loss and expenses of removal and protection of the goods during a fire ; and in the absence of an express agreement, the proportion to be borne by each will be according to his interest. If, for example, the property is insured for one-half its value, each will bear one-half of such expense ; if for three-quarters, then the insurer pays three-fourths and the insured one-fourth.³ But insurance in a gross sum on property situated in different and distinct buildings covers all that may be destroyed in either building, to the amount of the insurance.⁴ Where A. had deposited a large amount of cotton on storage with a warehouse company, and had effected, among others, an insurance against fire on two particular lots, — at one time on fifteen bales, and at another on thirteen bales, — and the warehouse containing the cotton of A., with that of others, was destroyed by fire, and a portion of the cotton was saved and sold at auction, by instruction of a committee of the insurance companies interested, the net proceeds of which sale were distributed, under the direction of the committee, among the assured ; in an action by A. to recover on his two policies, it was held that, in ascertaining the amount of loss or damage which the plaintiff should recover, the jury ought to deduct such sum as they might find from the evidence was the proportion due to twenty-eight bales in the distribution of the proceeds of sale of the cotton saved.⁵

§ 428. **Loss ; Interest ; Mode of Payment ; Evidence ; Set-off.**— If there be no provision in the policy regulating the payment of the loss, it will be due on notice and proof, and interest will be reckoned from that date.⁶ But if a time is fixed for the pay-

¹ Franklin Fire Ins. Co. v. Hamill, 5 Md. 170. See also *post*, § 430 *et seq.*

² Peoria Fire & Mar. Ins. Co. v. Wilson, 5 Minn. 53.

³ Wells v. Boston Ins. Co., 6 Pick. (Mass.) 182.

⁴ Nicolet v. Insurance Co., 3 La. 371 ; Rix v. Mut. Ins. Co., 20 N. H. 198.

⁵ Hough v. People's Ins. Co., 36 Md. 398.

⁶ [Interest cannot be recovered in an action to recover the amount of an in-

ment, then interest will run from the time so fixed,¹ unless the defective nature of the proof leaves the amount fairly open to dispute,² it being then in the nature of unliquidated damages, on which as a rule no interest is recoverable, or unless by trustee process, want of authority to receipt for it, or otherwise, the insurers be prevented or excused from paying at that time.³ Payment of loss in gold, if agreed upon, is compulsory; but this does not carry with it an obligation to pay dividends of profits also in gold.⁴ Where the insurance was on corn shipped from Chicago to Montreal, and the loss was payable to the bank of Montreal, in funds current in the city of New York, it was held that, in estimating the amount of the liability of the insurers, the premium in gold should not be allowed in favor of the insurers.⁵ The fact that the loss is in a foreign country does not add the expense of transmission of the amount due to the amount of the loss.⁶ The market value at the time of the loss, and when the property is but partially destroyed and only damaged, the difference between the value of the property as it is and as it was, ascertained by a sale at auction, with notice to the parties interested, are

surance policy. *Higgins v. Sargent*, 2 B. & C. 348 at 350. But *contra*, if a distinct demand on the insurer has been made and notification of the ground of such demand. *Bain v. Case*, 3 C. & P. 496 at 498.]

¹ [When a policy provided for a payment of the loss within sixty days after satisfactory proofs of the same, and when proofs were furnished and the company within that time offered a part payment only, it was held that interest began to run from the demand, the time limit being waived. *Baltimore Fire Ins. Co. v. Loney*, 20 Md. 20 at 40. On the other hand, if the company makes reasonable efforts for an adjustment, interest is not chargeable from the expiration of the sixty days, but only from judicial demand. *Gettwerth v. Teutonia Ins. Co.*, 29 La. Ann. 30 at 32.]

² *McLaughlin v. Wash. County Mut. Ins. Co.*, 23 Wend. (N. Y.) 525; *Bridge v. Niagara Ins. Co.*, 1 Hall (N. Y. Superior Ct.), 247, 261.

³ *Nevins v. Rockingham Fire Ins. Co.*, 5 Fost. (N. H.) 22; *Oriental Bank v. Tremont Ins. Co.*, 4 Met. (Mass.) 1; *Webster v. British, &c. Ins. Co. (Eng.)*, Ct. of App. 15 Ch. D. 169. See also *post*, § 479; *Howell v. Hartford Ins. Co.*, C. Ct., 3 Ins. L. J. 649; *Tooley v. Railway, &c. Ins. Co.*, C. Ct. (Ill.), 2 Ins. L. J. 275; *Delonguemere v. Traders' Ins. Co.*, 2 Hall (N. Y. Superior Ct.), 589; *Brown v. Railway Pass. Ass. Co.*, 45 Mo. 221.

⁴ *Luling v. Atlantic Mut. Ins. Co.*, 50 Barb. 520.

⁵ *Lamar Ins. Co. v. McGlashen*, 54 Ill. 513.

⁶ *Burgess v. Alliance Ins. Co.*, 10 Allen (Mass.), 221.

data upon which to find the value.¹ And there is no right of abandonment, as in marine insurance.² And it seems that the difference between a wholesale and a retail market value may be taken into account.³ An insurance company cannot pay a loss by a set-off of outstanding claims against the insured, purchased for that purpose. The act of purchase is *ultra vires*.⁴

§ 429. **Damages for Improper Refusal to renew.**—If a life insurance company improperly refuse to accept the premiums, under a plea that the policy is void, an action may be maintained against them for damages; and it seems that the rule of damages would not be confined to the amount of the premiums paid with interest. If the person whose life is insured, though alive, should be laboring under a disease that must speedily result in death, the insurers ought not to be permitted to escape the payment of the amount for which the life was insured by putting an end to the contract.⁵ So in Missouri the insured may, by statute, recover damages for a vexatious refusal to pay a loss.⁶ [If the company refuse to pay what is due, and endeavor by fraudulent accusations to intimidate the plaintiff and drive him to settle for a small amount, the jury may give the plaintiff damages and attorney's fees for refusal to pay in bad faith.⁷ If the policy provides for payment of loss on surrender of the policy, and the insurer refuses positively to pay, the insured may sue without showing tender of the policy.⁸]

¹ Hoffman v. West. Mar. & Fire Ins. Co., 1 La. Ann. 216; Henderson v. West Mar. & Fire Ins. Co., 10 Rob. (La.) 164. These cases must be considered as inconsistent with Marchesseau v. Merchants' Ins. Co., 1 Rob. (La.) 433, which holds that the market value at the time of the risk is the "best, though not conclusive" criterion of value.

² Ibid.; ante, § 421 a.

³ Hoffman v. Aetna Ins. Co., 1 Robt. (N Y. Superior Ct.) 501.

⁴ Kansas Ins. Co. v. Craft, 18 Kans. 283. But see post, § 592.

⁵ McKee v. Phoenix Ins. Co., 28 Mo. (7 Jones) 383; Union Central Ins. Co. v. Poettker (Superior Ct. Cincinnati), 5 Big. Life & Acc. Ins. Cas. 449; s. c. 4 Am. Law Record, 109.

⁶ Brown v. Railway Pass. Ass. Co., 45 Mo. 221; post, § 568.

⁷ [Watertown Fire Ins. Co. v. Grehan, 74 Ga. 642.]

⁸ [Schwarzbach v. Protective Union, 25 W. Va. 622, 648.]

§ 430. **Loss ; Payment ; Rebuilding.** — As one means of protecting themselves against extravagant claims for losses, insurance companies frequently reserve the right to rebuild a building, or to replace the property destroyed, as one mode of arriving at the amount of loss which shall be paid. This right, however, is not one which inheres in the nature of the contract, and can only exist where there is a special stipulation therefor, and then is optional.¹ If no time be fixed before which an election shall be made, it must be made within a reasonable time.² And if it be provided that the company shall have a right to rebuild or replace, within a reasonable time, and where they elect so to do, the insured shall give security to pay one-third of the cost, and that “the insured shall have no right of action unless the insurers neglect for thirty days after the giving such security to proceed to rebuild,” &c., the right of action is only suspended during the time within which the company has a right to rebuild ; and if the rebuilding duly commenced has not been finished in a “reasonable time,” an action may be brought,—the question of reasonable time being for the jury.³ And if the insurers give notice of an election to repair, and subsequently refuse, they will be liable for damages intervening between the fire and the refusal, by reason of exposure to the weather.⁴ An election to repair, after fruitless negotiations to settle, and a month after the proofs of loss had been furnished, was held to have been within reasonable time.⁵ And in the repairing, if the company be a mutual one, and restricted by its charter to a certain amount of expenditure, this becomes part

¹ *Wallace v. Insurance Co.*, 4 La. 289 ; *Commonwealth Ins. Co. v. Sennett*, 37 Pa. St. 205 ; *Home Mut. Fire Ins. Co. v. Garfield*, 60 Ill. 121.

² [The condition allowing the company to rebuild cannot be invoked against a suit for pecuniary indemnity unless the company have within a reasonable time distinctly elected to rebuild, and put the plaintiff in fault for refusing to permit such rebuilding. *Daul v. Firemen's Ins. Co.*, 35 La. Ann. 98.]

³ *Haskins v. Hamilton Mut. Ins. Co.*, 5 Gray (Mass.), 432. But see *ante*, § 423.

⁴ *Am. Central Ins. Co. v. McLanathan*, 11 Kans. 533.

⁵ *Sutherland v. Soc. of Sun Fire Office*, 14 Ct. of Sess. Cas. N. S. (Scotch) 775.

of the contract, and the amount cannot be exceeded.¹ And a consent after loss to pay it to a third person does not deprive the insurers of the right to pay by rebuilding.² When the option is to pay or repair, it must doubtless be exercised as to the whole loss. It would not be permissible to pay in part and repair in part.

§ 431. **Loss ; Rebuilding ; Damages ; New for old.** — In *Brinley v. National Insurance Company*,³ the insurance company, under the right to rebuild, had erected a new building upon a somewhat different plan from the old one, which had been totally destroyed. And the question arose, on a suit to recover for the loss, What was the rule of damages? whether the insurers, as the plaintiff contended, should pay the actual cost of restoration, or whether, as the defendant contended, they should be allowed a deduction on account of the additional value of the new building. And hereupon the court (Wilde, J.) observed : —

“ At the trial, the defendants contended that, as a new store of similar dimension and plan as the old one had been built, a deduction ought to be made from the estimated cost of a new store, for the difference in value between the old store and the new one ; analogous to the deduction of new for old in the adjustment of losses on marine policies. This claim of deduction was not sustained by the judge at the trial ; and we are not aware of any authority or principle by which it can be supported. The rule in adjusting marine losses is arbitrary, and operates in some cases unjustly, giving to the insured more or less than a full indemnity, to which he is entitled by the policy, and to no more. The rule originated from the usages among merchants and underwriters, probably from the great difficulty of ascertaining the actual loss, without first repairing the damage done, or estimating the cost of repairs. The rule is applicable only to cases of a partial or a constructive total loss. It depends on usage, sanctioned by judicial decisions ; and in some cases this rule of estimating the

¹ *Home Mut. Ins. Co. v. Garfield*, 60 Ill. 121, 124. But see § 425.

² *Tolman v. Manufacturers' Ins. Co.*, 1 Cush. (Mass.) 73.

³ 11 Met. (Mass.) 195.

loss is expressly provided for by the terms of the policy. Such has been the stipulation in the marine policies in Boston for many years. But the rule has never been adapted to policies of insurance and other property against fire. The question then is, What is the rule of damages, if any there be, in cases like the present? The plaintiff's counsel contends that the actual loss is to be ascertained by the expense of restoring the property without any deduction for the difference of value between the new and old materials; and so the rule is laid down by Professor Greenleaf.¹ But the only adjudicated case he cites which has any distinct bearing on the question, is that of *Vance v. Forster*,² in which Mr. Baron Pennefather laid down a very different rule. He says, as is reported in 3 Stevens,³ that 'the jury are to say what state of repair the machinery was in, what it would cost to replace it by new machinery, and how much better (if at all) the mill,' in which the machinery was placed, 'would be with the new machinery than it was at the time of the fire; and the difference is to be deducted from the entire expense of placing there such new machinery.' This rule, in all cases where the cost of repairs is one of the elements by which the jury are to estimate the actual loss, seems to be founded on the principles of justice, as it will give to the assured a full indemnity, and no more, to which he is entitled by the contract. But by the rule contended for by the plaintiff's counsel, the assured in most cases would recover more than an indemnity; and much more when the building insured is dilapidated and much out of repair. Such rule is not supported by any principle of justice, nor by the authority of any adjudged case. It is founded on an erroneous construction of the contract. It supposes that the insurers are bound to repair the building, or to pay the expenses of the repairs. But no such obligation is imposed on them by the policy. They have the privilege to make the requisite repairs, if they see fit to protect themselves against the recovery of excessive damages, or for any other reason. But if they elect not to make

¹ 2 Greenl. on Ev. § 407.

² 1 Irish Circuit Cases, 47, 51.

³ N. P. 2084.

the repairs, they are liable only to pay a fair indemnity for the loss. But whatever may be the rule when the building insured is partially injured by the peril insured against, it has no application to cases like the present, where the building is totally destroyed and is to be replaced by a new one. The rule of damages in cases on marine policies would not apply to a case where the ship had been totally destroyed. In the present case, the building was destroyed by fire, and a new building was erected upon a different plan; so that the cost of a new building could not be certainly ascertained. If the rule laid down in *Vance v. Forster* were applied, the jury must ascertain, by the estimates and opinions of witnesses, the amount of the expense of a new building, and they must estimate the value of the old building, in order to ascertain the difference, if any there be, between the new and the old. We can perceive no use in requiring this double estimate; for where the plaintiff is only entitled to recover the amount of the value of the building destroyed, the estimate of the cost of a new building is useless." It seems to have been held, in *Franklin Fire Insurance Company v. Hamil*, that where partial repairs had been made, but only partial, these could not be taken into account in the estimation of the loss.¹

§ 432. **Loss; Rebuilding; Refusal to permit.** — If before the time expires within which the insurers may elect to rebuild or replace, the insured proceeds to remove the goods, so that the insured cannot determine the amount to be replaced, or to rebuild the building so that the insurers cannot rebuild without undoing what has been done, or availing themselves of what has been done, a court of equity will not interfere to restrain the insured. The fact of removal might be an important question in determining the question of damages, and might authorize them to find bad faith on the part of the insured as to the amount of his claim. And as in the other

¹ *Ante*, § 426. In *Woodruff v. Imperial Ins Co* (N. Y.), 10 Ins. L. J 125, where the policy required a particular award, showing the actual cash value, which was not to exceed the cost of replacement, evidence was held admissible as to the cost of replacement.

case the contract of insurance having been substantially converted into a building contract, the rule of damages under such contract will obtain.¹ If the election be not made, indemnity for the loss, and not the cost to replace, is the test of damages.² If, on the other hand, the insurance company elect to rebuild, and are proceeding to do it in an improper manner, a court of equity will not interfere to compel them to do it as they ought, but will leave the insured to his suit at law for damages, as if he had contracted with any third person ;³ and he may refuse to accept, unless the rebuilding is according to the conditions of the contract.⁴ If the insurer neglect to exercise his option to rebuild within the specified time, the insured, and he alone, may waive the right, and allow the insurers to rebuild ; nor can the mortgagor or creditor intervene to prevent.⁵

§ 433. **Loss ; Partial Rebuilding ; Interference of Public Authorities.** — If the insurers intending to perform their duty in good faith make repairs of substantial benefit, though not to the amount of the loss, in the estimate of damages they are to be charged with the difference between the value of the building

¹ *New York Fire Ins. Co. v. Delavan*, 8 Paige (N. Y.), 419 ; *Beals v. Home Ins. Co.*, 36 N. Y. 522. That the contract by an election to rebuild becomes a new contract is accepted as law, only in a very qualified sense, *post*, § 433 ; though the doctrine is adhered to in New York : *Heilmann v. Westchester Fire Ins. Co.* (N. Y.), 19 Alb. L. J. 131, where it was also held that the insurers having given notice of their intention to rebuild, and subsequently refused so to do, action must be brought in the name of the mortgagor, he being the insured, loss payable to the mortgagee ; that neither the amount of loss nor the amount of insurance would be controlling on the question of damages ; that the mortgagee's right was limited to the receipt of payment in case the option to rebuild was not exercised, with perhaps an equitable remedy to prevent the misappropriation of the money. But it is elsewhere held, with great force of reason, that the election to rebuild does not convert a contract of insurance into a new contract to rebuild, but is only a mode of performance of the old one. *Bank of New South Wales v. Royal Ins. Co.*, 9 Ins. L. J. 930, citing and explaining *Brown v. Royal Ins. Co.*, 1 E. & B. (Q. B. Eng.) 853 ; *Home Ins. Co. v. Garfield*, 60 Ill. 124.

² *Com. Ins. Co. v. Sennett*, 37 Pa. St. 205.

³ *Home Ins. Co. v. Thompson*, 1 U. C. (Err. & App.) 247.

⁴ *Alley v. Quebec Ins. Co.*, 11 L. C. 394 ; *Ryder v. Commonwealth Ins. Co.*, 52 Barb. (N. Y.) 447.

⁵ *Stamps v. Commercial Ins. Co.*, 77 N. C. 209.

as repaired and what it would have been if it had been fully repaired.¹ And such, it has been held in New York, would be the rule of damages where the insurers, having commenced to rebuild, desisted before the work was complete.² If after reinstatement the work proves to have been imperfectly done, the insured will have his action against the insurers for not having duly reinstated the property.³ And if after he has commenced to rebuild he is interfered with by the public authorities, and prevented from completing his work, or the building is ordered to be taken down as dangerous, even though its dangerous character was not attributable to the fire, the loss will be his. Nor will he be excused from paying the insured the entire amount of his loss, according to the agreement to rebuild or pay.⁴ So, if the consent of the public authorities to the rebuilding be required, and refused.⁵ But if the insured refuse permission to rebuild, he loses his right of action.⁶

[§ 433 A. **Repairing.** — If the company elects to repair instead of paying the loss, all provisions of the policy relating to payment, estimate of loss, &c., become thenceforth inoperative, and the only question is that of repairing in a proper manner.⁷ But the option to repair does not release from all liability on the policy. When the policy provides for deduction from the cost of repairing on account of depreciation, the measure of damages is the cost of repairs if the property is made as valuable as before the fire; if less valuable than before, the difference must be added to the cost to find the total for which the company is liable; if more valuable, the differ-

¹ *Parker v. Eagle Ins. Co.*, 9 Gray (Mass.), 152; *St. Paul Ins. Co. v. Johnson*, 77 Ill. 598.

² *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429. In this case there were two policies by different companies, both containing the provision about the right to rebuild. It was held that both might be sued jointly or severally. And if one only was sued and compelled to pay, this one would have an action over against the other for contribution. But see *ante*, § 423.

³ *Times Fire Ins. Co. v. Hawke*, 5 H. & N. (Exch.) 935.

⁴ *Brown v. Royal Ins. Co.*, 1 E. & E. (Q. B.) 853.

⁵ *Brady v. Northwestern Ins. Co.*, 11 Mich. 425.

⁶ *Beals v. Home Ins. Co.*, 36 Barb. (N. Y.) 611.

⁷ [*Wynkoop v. Niagara Fire Ins. Co.*, 91 N. Y. 478.]

ence is to be subtracted from the cost.¹ In deciding the deduction from the cost of replacing the property, to be made on account of its depreciation before the fire, the proper question to a witness is not to inquire his opinion of the amount of depreciation, but what was the condition and value of the building at the time of the fire.² The election to rebuild or repair once made is irrevocable, and is deemed to be made with knowledge of existing ordinances. A law preventing the erection of a frame building is no excuse for failure to rebuild, since the company might have used brick, and if the insured builds of brick after failure of the company to do so, he may recover the cost and damages for delay.³ Where the company has an option, within fifteen days after statement of loss, to notify the insured of its intention to repair, the insured does not lose his right to recover by making within the fifteen days repairs necessary to preserve the property from further damage.⁴ When a building in which one of the heirs of the deceased owner who insured it has a life estate and another a reversion, is injured by fire, it is the right of each or either of them to have the indemnity resulting from the insurance applied to repairing the building.⁵ If a policy is given to a first mortgagee as collateral, and the insurance money used to make repairs, the order of the incumbrancers is not changed thereby. The funds so used do not operate to pay the first mortgage.⁶]

§ 434. **Loss ; Contribution.** — We have already seen that in cases of double insurance, that is, where several policies in different offices insure the same party upon the same subject-matter against the same risk, as there can be but one loss and one indemnity, the several offices, as between themselves, must contribute proportionably to the loss, though each is liable to the insured for the entire loss, unless there is a special agreement that each shall be liable only for its proportional

¹ [Commercial Fire Ins. Co. v. Allen, 80 Ala. 571.]

² [Hegard v. Cal. Ins. Co., 72 Cal. 535.]

³ [Fire Assurance v. Rosenthal, 108 Pa. St. 474.]

⁴ [Eliot Five Cents' Savings Bank v. Commercial Ass. Co., 142 Mass. 142.]

⁵ [Brough v. Higgins, 2 Grat. 408 at 413.]

⁶ [Seybold v. Garceau, 31 L. C. Jur. 159 ; 32 id. 316.]

part.¹ The several insurers are regarded as if they were one,² each standing as co-surety with the other, according to the amount which he undertakes, just as if all had underwritten the same policy. To avoid circuity of action, the *pro rata* limitation was introduced.³ And if an office having in its policy the provision for the proportional liability pay more than its share, it can have no remedy for contribution against the other offices, since its own negligence can give it no right of action against others.⁴ It may, however, have a remedy against the assured.⁵ [When the loss was greater than the whole amount insured, it was held that the various underwriters must pay their whole insurance respectively.⁶ A policy provided for apportionment, and also that "the company shall only be obliged to pay as if they had insured two-thirds of the actual cash value of the property," which was \$6000. There was double insurance, one policy for \$4000, and one for \$1998. It was held that the two-thirds provision simply defined the maximum liability, and did not entitle the company to pro-rate on a two-thirds basis, and that as the loss was total and

¹ [If there are several insurances on the same property, the companies must contribute *pro rata*. *Thurston v. Koch*, 4 Dall. 348, 3d Cir. (Pa.) 1880. Persons insuring policies on the same property are co-insurers, and are not jointly liable, but only in proportion to the amount which each insures. *Chesbrough v. Home Ins. Co.*, 61 Mich. 333. The plaintiff is entitled only to one indemnity. Add, therefore, the amounts insured in the various companies to find a total amount. Find what percentage of this total the amount of the A. policy is, and you have the percentage of the loss that the A. company is to bear. *Barnes v. Hartford Fire Ins. Co.*, 9 Fed. Rep. 813; 3 McCrary, 226, 8th Cir. (Minn.) 1882. Where the insurance exceeds the loss, the adjustment among the companies should be; as the total insurance is to the total loss, so is the first company's policy to the first company's liability. *Robbins v. People's Ins. Co.*, 2 N. J. L. J. 213, 3d Cir. (N. Y.) 1879. In a case of double insurance, the assured may elect to sue one company, and that may then have contribution against the other. *Wiggin v. Suffolk Ins. Co.*, 18 Pick. 145 at 153]

² *Ante*, § 13. See also, in addition to the authorities therein cited, *Harris v. Prot. Ins. Co.*, *Wright (Ohio)*, 548; *Hough v. People's Ins. Co.*, 36 Md. 898; *Mechanics' Fire Ins. Co. v. Nichols*, 1 Harr. (N. J.) 410; *Liverpool, &c. Ins. Co. v. Verdier*, 33 Mich. 138; *Baltimore Fire Ins. Co. v. Loney*, 20 Md. 20; *Tuck v. Hartford Fire Ins. Co.*, 56 N. H. 326.

³ *Howard Ins. Co. v. Scribner*, 5 Hill (N. Y.), 298.

⁴ *Lucas v. Jefferson Ins. Co.*, 6 Cowen (N. Y.), 635.

⁵ *Fitzsimmons v. City Fire Ins. Co.*, 18 Wis. 234.

⁶ [*Phillips v. Perry Co. Ins. Co.*, 7 Phila. 673 at 675.]

exceeded the total insurance, each company must pay the whole amount of its policy without any apportionment.¹ Where several agents of different companies joined to insure for \$12,000, specifying the company, and it was not shown that the companies did business together, or that the agents were agents for them jointly, it was held that the agreement bound each company for its proportion of loss, and not all jointly for the whole.² Where several companies concerned agree jointly to resist a claim, and one of them, A., is afterward sued by X., for services in that defence, and is compelled to pay the whole amount, it may sue B. for contribution, and B. cannot defend on the ground that A. did not plead non-joinder against X., B. having knowledge of the suit by X., and not requesting such plea. Other companies in the agreement, but non-insolvent, are to be laid out of the account. As B. was the only company within the jurisdiction of the court, and as its policy was of the same amount as A.'s, B. was made to pay one-half the amount recovered from A. by X.³ Where several companies interested in a loss give notice of intent to rebuild, thus turning the policies into building contracts, the insured may settle with some of the companies, and sue others severally for their proportion of the loss, which is to be calculated without regard to the facts that some of the companies were released for less than they were liable for or were insolvent.⁴ Contribution will take effect only among policies upon the same interest in the same property. Even though it is agreed that "any policy attaching to the property covered by this policy" shall be considered as contributing insurance, yet a policy on that property running to another person to secure *his* interest, or running to the plaintiff to secure, not his own interest, but that of another for whom he is trustee, will not contribute, and is not within the fair contemplation of the contributing clause.⁵]

¹ [Lebanon Mut. Ins. Co. v. Kepler, 106 Pa. St. 28.]

² [Fitton v. Phoenix Ass. Co., 25 Fed. Rep. 880 (Vt.), 1885; 23 id. 3.]

³ [Security Ins. Co. v. St. Paul Ins. Co., 50 Conn. 233.]

⁴ [Good v. Buckeye Mut. Fire Ins. Co., 43 Ohio St. 394.]

⁵ [Lowell Manuf. Co. v. Safeguard Fire Ins. Co., 88 N. Y. 591.]

§ 435. **Loss ; Contribution ; Double Insurance ; Identity of Risk.** — In the case of *Howard Insurance Company v. Scribner*,¹ it was held that double insurance occurred only when the subsequent insurance was upon the same precise property as that covered by the first ; and that insurance in one policy on fixtures for \$1000, and on stock for \$3000, and in another policy for \$5000 on stock and fixtures as one parcel, was not a double insurance. As a consequence, the rule of apportionment in case of other insurance did not apply, and recovery might be had on the first policy, without regard to the second. But this doctrine has been repudiated in a very recent case.² In considering the case, the court said : —

“ The clause now usual in policies of insurance which provides for an apportionment of the loss, in case of other insurance on the property, is a part of the contract, and must receive a reasonable construction. We have no right to engraft upon it the rules governing suits for contribution among insurers, or to restrict its operation to cases where such suits could be maintained, but must look at the language of the clause itself, and construe it as we would any other stipulation between the insurer and the insured.

“ We cannot adopt the view taken of this clause in the case of *Howard Insurance Company v. Scribner*, where it was held, in analogy to the rule in actions for contribution, that where a specific parcel of property is insured by one policy, and the same property is covered by another policy, which also includes other property, the latter policy is to be thrown wholly out of view, and does not constitute other insurance within the meaning of the clause ; in either case, the whole sum insured by the more comprehensive policy is to be considered as so much additional insurance upon the parcel separately insured.

“ Where several parcels of property are insured together for an entire sum, it is impossible to say, as to either of the parcels, that there is no insurance upon it, neither is it reasonable to assume that any of the parcels is insured for more than

¹ 5 Hill (N. Y.), 298.

² *Ogden v. East River Ins. Co.*, 50 N. Y. 388.

its value, when the whole sum insured is less than the aggregate value of all the parcels covered by the policy. The difficulty lies in determining what part of the whole sum insured is to be deemed applicable to either parcel, when the policy itself makes no separation.

“If the entire property is destroyed, as in this case, the rule laid down in 2 Phillips on Insurance,¹ and in *Blake v. Exchange Mutual Insurance Company*,² carries out the intent of the clause, and works entire equity between the insurers and the insured as well as between the several insurers. That rule is, in substance, that for the purpose of apportioning the loss, in case of over-insurance, where several parcels are insured together by one policy for an entire sum, and one of the parcels is insured separately by another policy, the sum insured by the first-mentioned policy is to be distributed among the several parcels in the proportion which the sum insured by the policy bears to the total value of all the parcels. Thus, in round numbers, the sum insured in this case by the policies other than the defendants’ on the property as an entirety, was \$47,000. The total value of the property covered by these policies was \$88,000. In case of a total loss, each parcel should be deemed insured thereby for $\frac{47}{88}$ of its value. The parcel separately insured by the defendant was worth \$16,000, and was insured by the defendant for \$3000, which was equal to $\frac{3}{16}$ of its value. It is manifest that there was no over-insurance, and that consequently there is no occasion for any apportionment.”

And substantially this rule has been followed in Kentucky³ and in Missouri.¹ In another case in Massachusetts, a policy was taken for \$3000, “additional to \$9000 insured in other offices, and \$8000 to be insured in other offices.” There was in fact at the time of loss but \$11,000 additional insurance.

¹ Page 36, No. 1263 *a*.

² 12 Gray, 265.

³ *Cromie v. Ken. & Lou. Mut. Ins. Co.*, 15 B. Mon. (Ky.) 432.

⁴ *Angelrodt v. Delaware Ins. Co.*, 31 Mo. 593. But *Scribner’s* case has been followed in Pennsylvania. *Sloat v. Royal Ins. Co.*, 49 Pa. St. 14; see also *Royal Ins. Co. v. Roedel*, 78 Pa. St. 19, — cases, however, hardly reconcilable with *Merrick’s* case, cited in § 436, *post*.

It was held that the insurers must pay in proportion to the amount of actual, and not of contemplated, insurance.¹ Nor is the insured bound towards one company to keep up the amount of his insurance in other companies.²

When two policies coexist, each providing that the company shall be liable only for its proportionate amount of the whole insurance, and the former becomes invalid by reason of the subsequent valid insurance, the latter, not requiring notice of prior insurance, is good for the whole amount payable, in case of loss.³

The insured is entitled to his indemnity, and no more.⁴ But the adjustment must be so made as to give full indemnity; and if one company has restricted its liability, and the other has not, it may happen that the latter will have to pay more than its proportion of the whole loss. Thus, where A. insured on live-stock \$1500, B. on live-stock \$1667, "not to exceed \$500 on any one animal," and C. on live-stock \$1667, no one animal to be valued at more than \$500; and steers valued at \$336, and a bull valued at \$2000, were lost, the rate was held to be limited in favor of B. and C., while A. was held to make up the balance, being more than its proportion but for the restriction of the liability in the other policies, sufficient to give the insured his full indemnity.⁵ Otherwise if the liability be restricted by charter.⁶

§ 436. **Loss; Contribution; Floating Policy; Specific Insurance.** — But under a general or floating policy, intended to cover property which cannot well be covered by specific insurance, from the circumstance that it is changing in quantity or location, as where the policy, as a "condition of average," provides that if the merchandise should at the time of

¹ *Richmondville v. Hamilton Mut. Ins. Co.*, 14 Gray (Mass.), 459. See also *Haley v. Dorchester Mut. Ins. Co.*, 1 Allen (Mass.), 536; *Tuck v. Hartford Fire Ins. Co.*, 56 N. H. 326.

² *Quarrier v. Insurance Companies*, 10 W. Va. 507.

³ *Hand v. Williamsburgh, &c. Ins. Co.*, 57 N. Y. 41.

⁴ *Cromie v. Kentucky, &c. Ins. Co.*, *supra*.

⁵ *Sherman v. Madison Ins. Co.*, 39 Wis. 104. See also *Royal Ins. Co. v. Roedel*, 78 Pa. St. 19.

⁶ *Bardwell v. Conway Mut. Ins. Co.*, 122 Mass. 90.

any fire be insured by any specific insurance, then the policy should not extend to cover such merchandise, excepting only so far as relates to any excess of value beyond the amount of the specific insurance, which excess, however, the policy will protect, no claim can be made under the floating policy, if the specific insurance exceeds the amount of the value of the goods insured by it and destroyed.¹

Where, however, four policies provided that "if at the happening of any fire the assured shall have insurance under a floating policy or policies not specific, but covering goods generally in various places not designated, and yet within limits which include the premises or property herein insured, such policy, as between the insured and this company, shall be considered as covering any excess of sound value of the subject insured beyond the amount covered by the specific insurances thereon; and to determine the amount for which this company is liable in case of loss such floating policy shall be considered an insurance on the property to the extent of such excess," and other companies insured on specific property in the same enclosure, it was held that the liability on the four policies was not confined to the excess of loss above that covered by the specific insurance, but they must contribute ratably on the property insured in the specific policies which was covered by their general policies.²

In the following case certain policies were held to be specific: Between the 5th of February, 1870, and the 15th of July, 1870, both days inclusive, the appellants deposited on storage in a certain warehouse, occupied by the Baltimore Warehouse Company, sundry lots of cotton in bales. For each lot deposited the appellants received from the warehouse company a receipt, warrant, or certificate, which specified the number of bales, and the date of the deposit, and also the mark on the bales,—the letters X. Q. being marked on each bale so deposited. These receipts or certificates were all numbered. On the 20th of June, 1870, the appellants de-

¹ *Fairchild v. Liv. & Lon. Fire & Life Ins. Co.*, 51 N. Y. 65.

² *Merrick v. Germania Ins. Co.*, 54 Pa. St. 277, Woodward, J., dissenting.

posited fifteen bales and took a receipt therefor, numbered 1221, and on the following day a policy of insurance was taken out to cover the particular number of bales thus deposited. On the 27th of June the appellants deposited thirteen bales, and took a like receipt therefor, numbered 1238, and on the same day effected an insurance for the particular number of bales thus deposited. On the face of each policy the loss, if any, was made payable to the warehouse company; and the policies and receipts were delivered to the warehouse company to secure advances made by it. On the policy on the fifteen bales there was indorsed in pencil in figures the number 1221, corresponding with the number of the warehouse receipt given therefor; and on the policy on the thirteen bales there was indorsed, also in pencil, 1238, corresponding with the number of the receipt for the cotton. At the time of each deposit the depositor reserved a sample of the particular lot deposited. The warehouse company held at the same time a general policy on goods held by them in trust. On these facts it was held that the policies were specific and not general: that each covered, and was intended to cover, the specific number of bales in each deposit, and the insurance on which was effected at the time of the deposit,—the policy of the 21st of June, 1870, covering only the fifteen bales deposited on the day previous, and the policy of the 27th of June the thirteen bales deposited on that day.¹ Under a floating policy, where the title to the property has actually passed, and the seller only holds the written title for the convenience of delivery to the purchaser, it is not covered by a policy which insures property for which the insured may be responsible;² nor will the insured, in a policy which may cover both his goods and the purchaser's, in such case be obliged to account for any insurance collected not in excess of the loss on his own goods.³

§ 436 a. **Contribution; Identity of Interest; Floating Policy.**
—Contribution has no more place, however, under a floating

¹ *Hough v. People's Ins. Co.*, 36 Md. 398.

² *North British, &c. Ins. Co. v. Moffatt*, 7 L. R. C. P. 25.

³ *Martineau v. Kitching*, 7 L. R. Q. B. 436.

policy than any other, unless all the insurance called upon to contribute is for the benefit of the same person, on the same subject or interest, and against the same risks. Thus floating policies were issued to B., a wharfinger, on goods, his own and such for which he was responsible, subject to the condition that "if at the time of any loss or damage happening to the insured property there be any other subsisting insurance effected by insured or another person on same property, the insurer shall be liable only for its ratable proportion of loss." While these policies were in force, a quantity of grain stored with B. was destroyed, part of which belonged to D., who had also other policies, called merchants' policies, on the grain destroyed, including also other grain, which contained the same condition as the wharfinger's policy. B. was paid in full. In a suit between the companies, it was held that the grantors of the merchants' policies were not liable to contribute to the loss, and that the grantors of the wharfinger's policy were ultimately liable for the whole, though B. was primarily liable.¹

§ 437. **Loss ; Contribution ; Double Insurance ; Identity of Risk.** — A warehouse company which received goods on storage, and gave receipts therefor, effected insurance in one company for \$10,000, against loss by fire for a year, "on merchandise generally held by them or in trust," contained in a particular warehouse. They also took out a policy from another company for \$20,000, "on merchandise, their own, or held by them in trust, or in which they held an interest or liability." The plaintiff, on the 20th and 27th days of June respectively of the year covered by the above policies deposited cotton with the warehouse company, and took receipts; and in each case took out policies from the defendants upon the respective lots of cotton deposited. Under these policies issued to the plaintiff, the loss, if any, was made payable to the warehouse company, with whom the plaintiff had other large amounts of cotton stored. In the policies to the plaintiff, as well as in those to the warehouse company, it was

¹ North British, &c. Ins. Co. v. Liverpool, &c. Ins. Co., 5 Ch. D. 569. See also Royal Ins. Co. v. Roedel, 78 Pa. St. 19; Sloat v. Royal Ins. Co., 49 id. 14.

stipulated that in case of loss the assured should not be entitled to recover on such policy any greater proportion of the loss or damage sustained to the subject insured than the amount thereby insured. July 18, 1870, and during the currency of all the policies, the warehouse was burned, and some of the bales of cotton destroyed, and others only damaged. Upon these facts it was held that the plaintiff's policies being made payable to the warehouse company insured to the benefit of the company, and were to be considered as in favor of the same assured on the same interest, in the same subject, and against the same risks as the policies which were issued directly to the company; that with the latter policies they constituted a double insurance, and the companies therefore issuing the policies were bound to contribute their respective proportions of the loss.¹ But a mortgagee who insures his interest subject to the usual provision for an apportionment of the amount to be paid in case of loss, is not to have the amount recoverable by him reduced by the fact that a subsequent mortgagee has insured his interest in another company. The interests are separate and distinct.²

§ 438. **Loss ; Contribution ; Restricted Liability ; Average.** — Insurers who restrict their liability to a certain proportion of the loss, will have the benefit of the restriction in case they are called upon for contribution. Thus, where the restriction is to two-thirds of the value of the property, and there is other insurance, and the whole loss is more than the two-thirds, the first insurers will be liable only for such a proportion of the loss, within the two-thirds, as the amount of their insurance bears to the amount of the second insurance.³ If the first insurance be three-fourths on \$2000, and other insurance exist to the amount of \$3000, in case of loss the first insurers will be liable only for two-fifths of three-fourths of the value of the property at the time of the loss.⁴ The provisions of the policy in the case just cited were, that "when

¹ Ibid. ; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527.

² *Fox v. Phoenix Ins. Co.*, 52 Me. 333.

³ *Goodall v. N. E. Mut. Fire Ins. Co.*, 5 Fost. (N. H.) 169.

⁴ *Haley v. Dorchester Mut. Fire Ins. Co.*, 12 Gray (Mass.), 545.

property is insured by this company solely, three-fourths only of the value will be taken, and in case of loss the company will be liable to pay only three-fourths of the value at the time of the loss," and that "in case of loss or damage of property upon which double insurance exists, the company shall be liable to pay only such proportion thereof as the sum insured by this company bears to the whole amount insured thereon,—such amount not to exceed three-fourths of the actual value at the time of the loss;" and their effect was thus stated by Bigelow, J.:—

"The defendants did not assume a liability in case of the existence of other insurance on the property, to be ascertained solely by calculating the proportion which the sum insured by them bore to the whole amount insured on the property. The basis of calculation was in all cases to be the value of the property insured, after deducting one-fourth of such value. Of this sum the defendants were to pay such proportion as the sum insured by the policy issued by them should bear to the whole sum insured by all the policies existing on the property at the time of the loss. In other words, the defendants were to be liable only for their proportion of three-fourths of the value of the property insured; and this proportion was to be ascertained by calculating the ratio which the sum insured in the policy declared on bore to the whole sum insured by all the policies existing on the property. Thus, if the whole property at the time of the loss amounted to ten thousand dollars, the sum on which the liability of the defendants must be reckoned would be three-fourths of ten thousand, or seven thousand five hundred dollars; and of this last sum the defendants would be held to pay only the proportion which the amount insured by them, viz. two thousand dollars, bore to the whole sum insured, viz. five thousand; or two-fifths of seven thousand five hundred dollars, which would be three thousand dollars. But as this last sum exceeds the whole amount insured by the defendants, it would be cut down to that amount, and the plaintiff could recover only two thousand dollars." A stipulation that the insured shall "recover three-fourths of the actual loss, pro-

vided three-fourths of the amount as aforesaid does not amount to more than three-fourths of the sum insured," is inapplicable in case of total loss, and in such case the insured is entitled to recover three-fourths of the actual value of the property insured.¹

§ 439. **Loss; Contribution; Reinsurance; Void Policy.** — If a policy of reinsurance provide that "In case there were other insurance, prior or subsequent, the reinsured should be entitled to recover only a proportionate part;" the other insurance spoken of refers to other reinsurance, and unless this exist the reinsurer can claim no proportionate reduction.² And so, if for any cause the other policies be invalid, there can be no contribution, as there is no other insurance.³ But the policy may provide for a *pro rata* liability, notwithstanding the invalidity of other policies,⁴ or the insolvency of other companies.⁵

§ 440. **Loss; Life Insurance; Contribution; Double Insurance.** — Generally, in life insurance, the questions of double insurance do not arise, as there is no fixed value to the life, and the person in each case is to pay a fixed sum, without regard to other insurance. But where the insurable interest has an ascertainable value the question may arise, as where two policies are taken out in different offices, by a creditor, on the life of a debtor, and for the same debt. Then only the value of the interest can be recovered, and the amount recovered on the first policy is to be deducted from the amount payable on the second.⁶

§ 441. **Loss; Alternative Damages.** — Under a policy of insurance in the sum of two thousand dollars against loss of life from accidental injuries, occasioning death within ninety

¹ Farmers' Mut. Ins. Co. v. Greybill, 74 Pa. St. 17.

² Mutual Safety Ins. Co. v. Hone, 2 Comst. (N. Y.) 235.

³ Hygum v. Aetna Ins. Co., 11 Iowa, 21.

⁴ Liverpool, &c. Ins. Co. v. Verdier, 35 Mich. 395.

⁵ Tuck v. Hartford Ins. Co., 56 N. H. 326.

⁶ Hebdon v. West, 3 Best & Smith, 113 E. C. L. 580. A joint judgment for the whole loss cannot be given against parties severally liable each for a portion, though jointly sued by consent. Insurance Cos. v. Boykin, 12 Wall. (U. S.) 433.

days from the accident, and in the sum of ten dollars a week, for a period not exceeding twenty-six weeks, against personal injury "for any single accident by which the insured shall sustain any personal injury which shall not be fatal," the weekly sum is due for injury by an accident which does not occasion death within ninety days, although it ultimately proves fatal. The two provisions are to be construed together, and the intent is that if an injury happens, within the meaning of the policy, it is insured against, as coming under one class or the other. If it were otherwise construed, an injury which should not prove fatal within ninety days would furnish no ground of action till it should be made to appear that it would never prove fatal,—a construction which would render the insurance nugatory in such cases.¹

§ 442. **Loss ; Payment by Mistake ; Recovery back.** — The holder of a life policy, on proof of the death of the insured, recovered the amount payable in such an event. It was subsequently ascertained, however, that the insured was not dead ; and thereupon the insurers brought suit to recover back the money so paid, as obtained by misrepresentation : and it was held that it appearing there was no want of good faith on the part of the holder of the policy, the insurers might recover upon condition, and only upon condition, of redelivery of the policy as a subsisting and valid contract.² A payment of the loss, or even an adjustment agreed upon, is, as a rule, a waiver of all questions as to liability which might have arisen on a trial. That such adjustment is made without knowledge of facts, which might if known have been effectual to defeat any claim, is of no avail, if the insurer might have known them upon inquiry, and was not fraudulently prevented from coming to their knowledge by the insured. Payment under such circumstances is not payment under a mistake of facts, since the facts might have been known if the insurer had thought it worth while to inquire

¹ Perry v. Prov. Ins. Co., 103 Mass. 242.

² North Brit. & Mer. Ins. Co. v. Stewart, 9 Ct. of Sess. Cas., 3d series, 534. And see *post*, § 575.

for them.¹ If either party to the adjustment has been led into it by fraud, it may be set aside by the party wronged, he first having restored, or offered to restore, any payment or advantage he may have received.² An adjustment, however, "subject to the terms and conditions of several policies," settles nothing but the amount to be paid bearing upon the question of liability.³

§ 443. **Loss; Fraudulent Overvaluation.** — Fraudulent overvaluation of goods destroyed is a complete defence to the claim for indemnity, but a mistaken or exaggerated overvaluation, not fraudulent, does not deprive the insured of the right to recover an amount equal to the actual loss.⁴

§ 444. **Loss; Evidence of Payment.** — Where the policy has been lost, and the court decrees the payment of the loss, the insurance company has no right to demand a bond of indemnity before payment. The decree of the court is the company's sufficient protection.⁵

§ 445. **Loss; Nominal and Real Claimants.** — The nominal and real claimants are frequently not the same. Owing to the form of the contract it often happens that one party is to bring suit to recover the loss, while after recovery it is to be paid over to others. The questions often therefore arise, Who is to sue? and who is to receive ultimately the amount recovered? The name of the insured may not be stated in the policy, as it need not be. And if the person for whose

¹ *Smith v. Glen's Falls Ins. Co.*, 62 N. Y. 85; *National Life Ins. Co. v. Minch*, 53 id. 144; *Beisecker v. Aetna Ins. Co.*, C. C. P. (Pa.), 4 Ins. L. J. 477. See also *post*, § 575; *Untersinger v. Niagara Ins. Co.*, Hamilton Co. Dist. Ct. (Ohio), 10 Ins. L. J. 237; *Northwestern Ins. Co. v. Roth*, 87 Pa. St. 409; *Dunn v. Commonwealth Ins. Co.*, C. Ct. (Ohio), 3 Ins. L. J. 631; *Stache v. St. Paul, &c. Ins. Co.*, 49 Wis. 89; *Hanna v. Andes Ins. Co.*, Superior Ct. (Cincinnati), 4 Ins. L. J. 396. In this case a director who had bought up several claims for fifty cents on a dollar, attempted, but without success, to collect the full amount of the company.

² *Potter v. Monmouth, &c. Ins. Co.*, 63 Me. 440.

³ *Whipple v. North British, &c. Ins. Co.*, 11 R. I. 139.

⁴ *Chapman v. Pote*, 22 L. T. 306, at *Nisi Prius*, Cockburn, C. J. And see *post*, §§ 477, 584; *ante*, § 373; *Sibley v. St. Paul, &c. Ins. Co.*, C. Ct. (Ill.), 8 Ins. L. J. 461; *Gerhauser v. North British, &c. Ins. Co.*, 6 Nev. 15; *Williams v. Phoenix Ins. Co.*, 61 Me. 67.

⁵ *England v. Tredegar*, 1 Law Reports, Eq. Cases, 344.

benefit the policy is made does not therein appear, or if the designation is applicable to several persons, or if the description of the insured is imperfect or ambiguous, so that it cannot be understood without explanation,—extrinsic evidence may be resorted to, to show for whom the insurance was intended; and those will be included within the benefits of the policy who shall appear to have been within the intention of the parties.¹ Where loss was payable to “heirs and representatives,” it was held that extrinsic evidence was admissible to show that the next of kin was intended.² A person may in his own name insure the property of another for the benefit of the latter, or in the name of the owner, without the knowledge of the latter, and the insurance will inure to the benefit of such owner if the proceeding be ratified and adopted by him even after loss.³ Insurance for the benefit of others than the party effecting the insurance is not equivalent to “for whom it may concern,” because it does not necessarily include all interests, but only such as may be shown to have been intended.⁴ An insurance, for example, is effected upon “the estate of Daniel Ross,” and it not being apparent who were intended to be included within that designation, evidence is admissible to show that both parties understood that the insurance was for the benefit of the widow and heirs of Ross. That the personal estate is represented by the administrator, and therefore the administrator was the person designated, is too strict a construction. The expression is rather used to designate the whole estate left by the deceased and held by those who have the legal title.⁵ [If the agreement

¹ *Waring v. Indemnity Ins. Co.*, 45 N. Y. 606; *Duncan v. Sun Mut. Fire Ins. Co.*, 12 La Ann. 486; *Herkimer v. Rice*, 27 N. Y. 163.

² *Myers v. John Hancock Mut. Life Ins. Co.*, 41 Mo. 598. But this case was disapproved of in *Wason v. Colburn*, 19 Mass. 35, where it was held to the contrary.

³ *Giffard v. Queen Ins. Co.*, 1 Hannay (N. B.), 432; *ante*, § 191. See also *Shawmut Sugar Co. v. Hampden Ins. Co.*, 12 Gray (Mass.), 540, which shows that where the parties interested in the contract are not designated therein, except indefinitely, it is for the jury to determine who they are.

⁴ *Lee v. Adsit*, 37 N. Y. 78.

⁵ *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Matthews v. Queen City Ins. Co.*, 2 Cincinnati Superior Court Reporter, 109; *Wash. Mut. Fire Ins. Co. v. St.*

is with the insured and his representatives and assigns, his administrator can sue in his own name.^{1]} So where the policy was issued to the "heirs and representatives of A.," the deceased, his executor, with power to sell and convey, was entitled to claim the proceeds, as holding the title in trust.²

§ 446. The general rule applicable to personal contracts is that, if assigned, the action for a breach must be brought in the name of the assignor, though the promise be to him and his assigns,³ except where the defendant has promised the assignee to respond to him. But a consent to the assignment is held to be the equivalent of this promise.⁴ And so, if the policy is made "payable, in case of loss," to a third party,⁵ or to bearer.⁶ So on life policies not under seal, the

Mary's Seminary, 52 Mo. 480; *Leavitt v. West. Mar. & Fire Ins. Co.*, 7 Rob. (La.) 351; *Globe Ins. Co. v. Boyle*, 31 Ohio St. 119; *ante*, § 390.

¹ [Tripp & Bailey v. Insurance Co., 55 Vt. 100.]

² *Savage v. Howard Ins. Co.*, 52 N. Y. 502. See also *Portsmouth Ins. Co. v. Reynolds (Va.)*, 9 Ins. L. J. 606; *Georgia Home Ins. Co. v. Kinnier*, 28 Grat. 88.

³ *Beemer v. Anchor Ins. Co.*, 16 U. C. (Q. B.) 485.

⁴ *Kingsley v. New England Mut. Ins. Co.*, 8 Cush. (Mass.) 393; *Phillips v. Merrimack Mut. Fire Ins. Co.*, 10 id. 350. *Contra*, *Jessel v. Williamsburgh Ins. Co.*, 3 Hill (N. Y.), 88.

⁵ *Motley v. Manufacturers' Ins. Co.*, 29 Me. 337; *Westchester Ins. Co. v. Foster*, 90 Ill. 121; *Ripley v. Aetna Fire Ins. Co.*, 29 Barb. (N. Y., 552; *Frink v. Hampden Ins. Co.*, 1 Abb. (N. Y.) Pr. Rep. n. s. 343; *Ennis v. Harmony Fire Ins. Co.*, 3 Bosw. (N. Y. Superior Ct.) 516; *Newman v. Springfield Fire & Mar. Ins. Co.*, 17 Minn. 123; *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6. If the loss, however, be payable in part only to a third person, the suit must be in the name of the one who has the right to enforce the whole contract. *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609; *Savings Institution v. Commercial Ins. Co.*, 68 Me. 313; s. c. and note, 8 Ins. L. J. 120; *Hammel v. Queen Ins. Co.*, 50 Wis. 240. But in *Guernsey v. American Ins. Co.*, 17 Minn. 104, the payee, whose claim was more than the whole insurance, was allowed to maintain the action. So where A. sued on a policy for \$2500, payable "to the extent of \$1000 to B. and \$400 to C., as their interests may appear," and recovered a verdict for \$1530, it was suffered to stand, B. and C. executing releases to the defendants. *Dear v. Western Ass. Co.*, 41 U. C. (Q. B.) 553. Where a lessee without authority obtains insurance, loss payable to the lessor, no suit can be maintained by the lessor, nor, it seems, by the lessee. *Hidden v. Slater Ins. Co.*, 2 Cliff. (C. Ct.) 266. [The clause "Loss payable to A. B.," enables the company to pay A. B., but an action for breach of the contract must be brought in the name of the person with whom the contract was made. *McQueen v. Phoenix Mut. Fire Ins. Co.*, 4 Can. Supr. Ct. R. 660.]

⁶ *Ellicott v. U. S. Ins. Co.*, 8 G. & J. (Md.) 166.

suit may be brought in the name of the beneficiary who is the insured;¹ and this is so notwithstanding the party who effects the insurance is styled a trustee, it appearing that he is merely an agent.²

§ 447. **Loss, Who may claim.**—And upon an order, indorsed on the policy, to pay in case of loss to a third party, accepted by the company, or assented to by them, the payee may maintain an action in his own name, on setting out the facts in his declaration.³ And an assignee of a life policy may recover not only his own interest, but also that of a third person, for whom he will be held a trustee, in his own name, without joining the *cestui que trust*.⁴ Such an assent, however, means only that the insurers will discharge the obligations of the contract to the assignee instead of the assignor; and if they, by the terms of the contract, had a right to replace the property, an assent to an order to “pay the loss” means only that they shall discharge the contract as agreed, and does not operate to change the terms of the contract so as to cut them off from the right to replace, and compel them to pay the money to the assignee. To pay is to discharge an obligation by a performance according to its terms or requirements. If the obligation be for money, the payment is made in money; if for merchandise or labor, a delivery of merchandise or performance of the labor is payment; or if for the erection of a building, performance according to the terms of the contract.⁵ In New Hampshire, however, in mutual companies, the action

¹ *Hogle v. Guardian Life Ins. Co.*, 6 Robt. (Superior Ct. N. Y.) 567.

² *Hillyard v. Mut. Ben. Life Ins. Co.*, 6 Vroom (N. J.), 415; *Flynn v. North Am. Ins. Co.*, 115 Mass. 449.

³ *Barrett v. Union Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 175; *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 id. 127; *Loring v. Manufacturers' Ins. Co.*, 8 Gray (Mass.), 28; *ante*, § 379. The action may also be brought in the name of the insured. *Martin v. Franklin Ins. Co.*, 38 N. J. (Law) 140; *Hand v. Williamsburgh Ins. Co.*, 57 N. Y. 41.

⁴ *St. John v. Am. Mut. Life Ins. Co.*, 2 Duer (N. Y. Superior Ct.), 419; *s. c.* affirmed, 13 N. Y. 31; *McCord v. Noyes*, 3 Brad. (N. Y. Surrogate Ct.) 139.

⁵ *Tolman v. Manufacturers' Ins. Co.*, 1 Cush. (Mass.) 73. And such a person has no right to cancel the policy. *Marrin v. Stadacona Ins. Co.*, U. C. (Ct. of App.), 15 Can. L. J. 191.

must be brought in the name of the assignor, although the assignment is assented to, and the policy is made payable in case of loss to a third party, unless by giving a new premium note the assignee becomes substituted for the insured, and a member of the company, when the action must be brought in the name of the latter;¹ and in New York.² And he may sue, in New Jersey, even on a parol agreement to pay the premium, the assignee being the mortgagee;³ and in Maine;⁴ and perhaps in Pennsylvania.⁵ But as such consent gives to the assignee no legal interest in the property, which remains still in the assignor, the latter may bring an action in his own name, without alleging any authority from the assignee.⁶ The assent, after action brought, will be sufficient, though in that case the plaintiff will be entitled to no costs.⁷

[§ 447 A. **Who may sue.** — Making a policy payable to a creditor "as his interest may appear" does not authorize him to sue, for the action cannot be split at the option of the assured.⁸ Where O. being indebted to T. gave him a trust deed, and then insured payable to T. as his interest might appear, the policy including other property not mortgaged to T., it was held that T. could not sue on the policy. He could not sue for the *whole loss*, there could be no splitting of the action, and he could not sue as trustee for O. O. was the owner of the policy, and she alone must sue.⁹ Where the owner of a building insures payable to the mortgagee as his interest may appear, if the amount of insurance in case of loss exceeds the

¹ *Nevins v. Rockingham Mut. Fire Ins. Co.*, 5 Fost. (N. H.) 22; *Folsom v. Belknap County Mut. Fire Ins. Co.*, 10 id. 231; *Rollins v. Columbian Fire Ins. Co.*, 5 id. 200; *Blanchard v. Atlantic Mut. Fire Ins. Co.*, 33 N. H. 9; *Chamberlain v. N. H. Fire Ins. Co.*, 55 id. 249; *Baldwin v. Phoenix Ins. Co.*, 10 Ins. L. J. 32.

² *Mann v. Herkimer County Mut. Ins. Co.*, 4 Hill (N. Y.), 187.

³ *Flanagan v. Camden Mut. Ins. Co.*, 1 Dutch. (N. J.) 506.

⁴ *Stimpson v. Monmouth Mut. Fire Ins. Co.*, 47 Me. 379.

⁵ *Lycoming County Mut. Ins. Co. v. Schreffler*, 44 Pa. St. 269.

⁶ *Ketchum v. Prot. Ins. Co.*, 1 Allen (New Brunswick), 136.

⁷ *Jackson v. Farmers' Mut. Fire Ins. Co.*, 5 Gray (Mass.), 52.

⁸ [*Thatch v. Metropole Ins. Co.*, 11 Fed. Rep. 29; 8th Cir. (Col.) 1882, 3 McCrary, 387; 11 Ins. L. J. 199; *Hatch v. Metropole Ins. Co.*, 13 Rep. 293.]

⁹ [*Thatch v. Metropole Ins. Co.*, 3 McCrary, 387.]

amount of the mortgage, the owner and mortgagee may sue jointly and get a judgment fixing their respective shares.¹ On a policy to C. payable to P., mortgagee, C. may, with the express consent of P., sue in his own (C.'s) name.² A contract made by one person for the benefit of another may be sued on by the latter.³ Both the assured and he to whom the proceeds of the policy are payable may be joined as plaintiffs in an action thereon.⁴ When A. and B. join as plaintiffs in an action against an insurance company on a policy issued to one alone, there being no words "whom it may concern," or the like, it is a fatal variance.⁵ When the policy is in the names of A. and B., but the action only in the name of A., an averment in the declaration of sole interest in A. admits evidence of such sole interest.⁶

[§ 447 B. **Who may sue.** — If a policy taken out by a part-owner is issued for whom it may concern, or for owners, the other proprietors may sue, but where the policy does not import insurance of other interests, only the person named can sue on it.⁷ When an action on a policy of goods was brought in the name of A. as owner, and it appeared that A., who had bought the goods, had consigned them to B., it was left to the jury to find who was owner.⁸ In a policy *on behalf of owners* no one but the owners can sue, while the phrase *for whom it may concern* permits suit by any one having an interest even though only a lien. In every case it must appear that the policy was made and intended to be in behalf of the one seeking to recover.⁹ A. may insure for himself and "all who may be interested," and may sue in behalf of B., at the time interested, who subsequently becomes privy by adoption.¹⁰ The executors are the only ones who can enforce

¹ [Home Ins. Co. v. Gilman, 112 Ind. 7.]

² [Coates v. Penn Fire Ins. Co., 58 Md. 172, 178.]

³ [Chrisman v. State Ins. Co., 16 Or. 289.]

⁴ [Lasher v. N. W. Nat. Ins. Co., 18 Hun, 98 at 101.]

⁵ [Burgher v. Columbian Ins. Co., 17 Barb. 274 at 274.]

⁶ [Marsh v. Robinson, 4 Esp. 98 at 98.]

⁷ [Turner v. Burrows, 5 Wend. 541.]

⁸ [Fleming v. Insurance Co., 12 Pa. St. 391 at 396.]

⁹ [Pacific Ins. Co. v. Catlett, 4 Wend. 76.]

¹⁰ [Hagedorn v. Oliverson, 2 Maule & Selw. 485 at 490.]

a policy unless the heirs are named. The property passes to the heirs, but the policy is not attached to and does not run with the estate, and only the representatives of the assured can recover.¹ A suit on a sealed policy must be brought in the name of the covenantee, whoever may be the interested person.² Dismissal or failure of suit because brought in the wrong name is no bar to another suit in the proper name.³ The president and secretary of a mutual company cannot require that all other members be made parties to a bill for the payment of insurance. They are competent to defend the interests of the company, and no injustice will be done them by ordering them to pay the amount out of association funds.⁴

§ 448. **Loss; Nominal and Real Claimants; Agent; Broker.** — If the policy be issued in the name of an agent of several parties, the suit may be in the name of the agent.⁵ So, if issued to a broker, "for whom it may concern;"⁶ or to a merchant, upon goods "in trust or on commission."⁷ But if issued to a tenant in common, it does not cover the interest of another, unless specifically so stated.⁸ If the policy be issued and made payable to an agent for the benefit of the principal, and without his knowledge, the latter may ratify even after the loss, and sue in his own name.⁹ Where an agent insured for a named principal, payable in case of loss to the agent by name, the principal was allowed to sue in Louisiana, and a debt due from the agent to the insurers was

¹ [Wyman v. Prosser, 36 Barb. 368 at 369.]

² [American Ins. Co. v. Insley, 7 Pa. St. 223 at 231; De Bollá v. Penn Ins. Co., 4 Whart. 68 at 72.]

³ [Fleming v. Insurance Co., 12 Pa. St. 391.]

⁴ [Van Houten v. Pine, 36 N. J. Eq. 133; 38 N. J. Eq. 72, 78.]

⁵ Barnes v. Mut. Fire Ins. Co., 45 N. H. 21; Goodall v. New England Mut. Fire Ins. Co., 5 Fost. (N. H.) 22; Waring v. Indemnity Ins. Co., 45 N. Y. 606; Graham v. Firemen's Ins. Co., 2 Disney (Ohio), 255. And see *ante*, § 446.

⁶ Prot. Ins. Co. v. Wilson, 6 Ohio St. 553; Strohn v. Hartford Ins. Co., 37 Wis. 625.

⁷ De Forest v. Fulton Fire Ins. Co., 1 Hall (N. Y. Superior Ct.), 84.

⁸ Work v. Merchants' & Farmers' Mut. Fire Ins. Co., 11 Cush. (Mass.) 271.

⁹ Herkimer v. Rice, 27 N. Y. 163; Bobbitt v. Liverpool, &c. Ins. Co., 66 N. C. 70; Hooper v. Robinson, 98 U. S. 528.

not allowed to be set off.¹ [When *A.* effects a policy as agent for *B.*, *B.* cannot maintain an action thereon to recover a loss for the use of *C.*, declaring *C.* to be alone interested in the property.² A wife cannot sue on a contract running to her husband though the property was hers, unless the policy show a trust or agency.³] Where the policy is assigned as collateral security, with the consent of the company, but the assignee has no interest in the property, both cannot join, and the assignee must sue.⁴ But a parol agreement by the company to recognize the rights of another under the policy, and to affirm its validity as to any particular property or interest, will give to that party a right of action on the policy in his own name.⁵ And there are many cases where a resort to equity will be necessary. As where *A.*, the insured, sells to *B.*, who takes in a partner, *C.*, the insurers consenting that the policy shall remain in part to *C.* and in part to *B.* and *C.*, the policy never having been assigned, nor any interest therein, to *C.*⁶ An administrator has no interest in real estate insured, and, it has been held, cannot sue to recover for a loss occurring after his appointment, though the contract is to make good to the administrators.⁷ But it has been frequently held otherwise.⁸ In Iowa, the real party in interest must bring the action; and although an assignment be prohibited, by special provision of the Code, the assignee may sue, subject to all rights of set-off and defence, legal or equitable, which might have been made against the assignor.⁹

§ 449. **Loss; Mortgagor and Mortgagee; Debtor and Creditor.**—If a mortgagor insures for himself, the mortgagee

¹ *Braden v. La. St. Ins. Co.*, 1 La. 220.

² [*Russell v. N. E. M. Ins. Co.*, 4 Mass. 82 at 84.]

³ [*Zimmerman v. Farmers' Ins. Co.*, 76 Iowa, 352.]

⁴ *Peabody v. Wash. County Mut. Ins. Co.*, 20 Barb. (N. Y.) 339; *Frink v. Hampden Ins. Co.*, 31 How. (N. Y.) 30.

⁵ *Wood v. Rutland Mut. Fire Ins. Co.*, 31 Vt. 552.

⁶ *Bodley v. Chenango County Mut. Ins. Co.*, 2 Comst. (N. Y.) 53.

⁷ *Beach v. Bowery Fire Ins. Co.*, 8 Abb. Pr. (N. Y.) 261.

⁸ *Lappin v. Charter Oak Ins. Co.*, 58 Barb. (N. Y.) 325; *Farmers' Mut. Ins. Co. v. Graybill*, 74 Pa. St. 17; *Germania Ins. Co. v. Curran*, 8 Kans. 9; 1 Ins. L. J. 171. See also *ante*, § 445.

⁹ *Mershon v. National Ins. Co.*, 34 Iowa, 87.

has no claim to the proceeds of the insurance without an assignment;¹ and where a mortgagee insures his own interest, without any agreement between him and the mortgagor, the latter has no claim to have any portion of the loss recovered applied to the discharge of his debt.² Otherwise if the mortgagee effects the insurance at the request and³ cost, and for the benefit of, the mortgagor.⁴ Where the mortgagor insures, payable to the mortgagee in case of loss, the mortgagor cannot sue alone unless the mortgagee has been paid, which he must allege. If not paid, both may join.⁵ Where the insurance is by the mortgagor payable to the mortgagee, as his interest may appear, and the mortgagee's interest is greater than the amount insured, he may sue in his own name.⁶ [Otherwise if his interest is less, then the clause in question is a mere appointment of a part of the money.⁷] If the death of a mortgagor and disposition by will before the loss work such a change of title or possession by legal process, judicial decree, or voluntary conveyances, or transfer, as would otherwise annul the policy, — which was not decided, — it will not deprive a mortgagee so protected of his right to recover.⁸ [Cancellation of the mortgage by payment of the debt after the fire, does not prevent the mortgagee from suing on a policy taken out by the mortgagor payable to the mortgagee.⁹] Where a creditor, with the knowledge and consent of the debtor, in account with the latter, charges him with the premiums paid for insurance on the debtor's life or his property,

¹ *Columbian Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507; *Carter v. Rockett*, 8 Paige (N. Y.), 437. *Contra*, *Gardon v. Ingram*, 23 L. J. (Ch.) 478.

² [*McIntire v. Plaisted*, 68 Me. 363 at 365.]

³ [Insurance procured by a mortgagee upon the request or at the expense of the mortgagor is held by the mortgagee for the protection of both interests, and the implied obligation arising, is that the insurance money when paid to the former shall apply upon the mortgage debt. *Waring v. Loder*, 53 N. Y. 581 at 585.]

⁴ *Concord Mut. Fire Ins. Co. v. Woodbury*, 45 Me. 447.

⁵ *Ennis v. Harmony Fire Ins. Co.*, 3 Bosw. (N. Y. Superior Ct.) 516.

⁶ *Hammel v. Queen's Ins. Co.*, 50 Wis. 240.

⁷ [*Fire Ins. Co. v. Felrath*, 77 Ala. 194.]

⁸ *Westchester Fire Ins. Co. v. Dodge* (Mich.), 1880, 9 Am. Law Record, 297.

⁹ [*Bartlett v. Iowa State Ins. Co.*, 77 Iowa, 86.]

he will be held to account for any surplus, over an amount necessary to pay the debt, received from the insurers, and on payment of the charges the debtor will be entitled to the policy,¹ if the facts show an agreement that the creditor is to insure, and the debtor pay the premium.² And yet if the debtor pays off the debt during his life, he will not be entitled to demand from his creditor a policy purchased and to be kept up at his expense as a security for his creditor,³ — a conclusion to which the Vice-Chancellor (Stuart) said, in the later case, he came with reluctance, because he found himself bound by the earlier case. But if the debtor insures to secure a debt part of which is usurious, the creditor must account for so much of the proceeds of the insurance as exceeds the debt less the usury.⁴ So, where a debtor took out a policy on his own life for the benefit of his creditor, paying the premiums thereon till he became bankrupt. The cash surrender value of the policy was then credited on the debt, and a dividend of twenty per cent also paid. From the bankruptcy and surrender the creditor kept the policy alive by paying the premiums himself, and upon the death of the debtor claimed the whole amount of the policy, which was considerably in excess of the value of debt due him. But it was held that from the time when the creditor began to pay the premiums the policy became a new security for so much as still subsisted of the debt; and when that was paid out of the proceeds, she ceased to be a creditor.⁵

§ 450. **Loss; Vendor and Vendee; Lessor and Lessee.** — Where the vendor, in a contract of sale of a house which is destroyed by fire before the completion of the purchase, re-

¹ *Holland v. Smith*, 6 Esp. 11.

² *Bruce v. Garden*, 22 Law Times, n. s. 595, per Lord Chancellor Hatherly, overruling Vice Chancellor James, in same case, 20 L. T. n. s. 1002; *Wheeler v. Factors & Traders' Ins. Co. (U. S.)*, 9 Ins. L. J. 876; *Moreland v. Isaac*, 20 Beav. 388.

³ *Gottlieb v. Cranch*, 4 De G., M. & G. 440; *Knox v. Turner*, 21 Law Times, n. s. 701.

⁴ *Coon, Adm'r, v. Swan*, 30 Vt. 6.

⁵ In the Matter of Newland, Dist. Ct. U. S., South Dist. N. Y., 2 Ins. L. J. 860.

ceives payment for the loss under a policy which existed at the date of the contract, no reference being made in the contract to the insurance, the vendee has no claim upon the funds.¹ But the assignee of a vendor's interest in a contract for the sale of real estate, which contract provides for an insurance by the vendee for the benefit of the vendor, is equitably entitled to the moneys due upon an insurance effected by such vendee in his own name; and where the insurer has notice of such assignment he is liable to such assignee, to the extent of his interest, although he has, after such notice, actually paid the loss to the vendee. And the fact that the policy is by its terms unassignable without the consent of the office, is immaterial, since the liability is not founded upon an assignment of the policy, but upon the equitable lien of the vendor's assignee, the insurer being, after notice, a trustee of the fund for the assignor's benefit.² Where a tenant agrees to insure for the benefit of his landlord, the latter deducting one-half of the premium from the rent as it accrued, it was held that the landlord was entitled to the whole of the insurance money.³

§ 451. **Loss; Insurance by Wife on her own Life for Benefit of Husband; Children.** — The proceeds of policies taken out by a wife, on which the premiums were paid by her out of her funds, on her own life, and for his benefit, before his bankruptcy, do not, on her decease, inure to the benefit of the bankrupt's estate.⁴ If the loss be payable to "children," this does not include grandchildren.⁵

§ 452. **Loss; Endowment Policy payable in the alternative.** — When the policy is on the loss of the husband, "for the sole use" of the wife, and payable to the husband or his assigns,

¹ Rayner v. Preston, Sup. Ct. Ch. D., 10 Ins. L. J. 76; Poole v. Adams, 12 W. R. 683; Paine v. Meller, 6 Ves. 349.

² Cromwell v. Brooklyn Fire Ins. Co., 44 N. Y. (Ct. of App.) 42.

³ Duke of Hamilton's Trs. v. Fleming, 9 Ct. of Sess. Cas., 3d series (Scotch), 329. And see also *post*, § 456.

⁴ Murrin v. Owen, Petr., C. Ct. (Mo.), *coram* Treat, J., 2 Ins. L. J. 524. So in Canada, under stat. 29 Vict. c. 17, which provides that the loss shall be paid as directed in the policy. Brossard v. Massouin, Supr. Ct. (Montreal), 4 Ins. L. J. 395.

⁵ Winsor v. Odd Fellows Association (R. I.), 10 Ins. L. J. 390.

or in case of his death within the time limited to the beneficiary, the loss goes to the wife only in case the husband dies within the limited time.¹

[§ 452 A. **Who has the Ultimate Right to the Proceeds?** — Payment of the premium on a policy, if without contract with the assured, gives no right in its proceeds.² Where one, neither a near relative nor a creditor, insures a life for his own benefit, although for the honest purpose of protecting himself under an agreement to support the assured life, still public policy will not allow him to retain more of the funds than is necessary to reimburse him; the rest belongs to the estate of the "life."³ The principle that insurance is for indemnity, and that loss is payable only so far as the insured had an insurable interest, prevents the administrator from recovering, or holds him as a trustee for the heir, or devisee, when the loss occurs after the succession of the property.⁴ Where a policy is made payable to the assured, his executors, or administrators, and assigns, the personal representative may, on the death of the assured, maintain an action thereon as trustee of the heirs on whom the interest devolves, and the damages stand in the hands of the administrator as really subject to dower and to the lien of creditors.⁵ Where a policy is payable "to the assured, his executors, or administrators," and any change of title except by "succession" is prohibited, the widow, occupying and having a life estate in the house by virtue of her marriage contract with the assured, has no interest in funds due on loss occurring after the assured's death; she takes by purchase. If she had taken as dowress or under the homestead laws she would have come within the principle which gives the funds to the "succession."⁶ Where C. insured his homestead by a policy running to himself and his representatives, and the house was

¹ *Tennes v. Northwestern Mut. Life Ins. Co.*, 26 Minn. 271; *ante*, § 390 *et seq.*

² [*Burridge v. Raw*, 1 T. & C. C. C. 183.]

³ [*Seigrist v. Schmoltz*, 113 Pa. St. 326.]

⁴ [*Quarles v. Clayton*, 87 Tenn. 308, a *dictum*, quoting 316 N. Y. & Minn. cases.]

⁵ [*Wyman v. Wyman*, 26 N. Y. 253.]

⁶ [*Quarles v. Clayton*, 87 Tenn. 308, 314, 316.]

burned after his death and while the widow, who was entitled to hold the premises for her life, was occupying the same, it was held that the policy devolved on those beneficially interested in the estate, and that if the administrator collected the insurance money he would hold it in trust for the widow during her life.¹ Insurance effected for the benefit of an equitable owner, and in pursuance of an agreement with him, is sufficient to hold the avails as against a trustee process instituted for the benefit of an attaching creditor of him who holds the legal title.² If A. and B. insure for a certain sum in a policy which declares that A.'s interest is an undivided two-thirds, and B.'s an undivided one-third, the contract will be joint, and if A. collects a loss, B. will be entitled to receive one-third of the money from him.³ When one having an interest insures generally, and he receives the amount of the loss, another part-owner may recover from him a share on proof of his interest therein, without showing a previous request to make the insurance.⁴ When one having goods sold but not removed in his possession, which he is under no obligation to insure, insures all his goods "sold but not removed, consigned, &c.," and recovers after loss, the owner of the first named goods cannot recover a proportional share when it appears that the insured received no more on account of including those goods in his statement of loss than he would otherwise.⁵ When A. effected insurance on his own goods and goods held by him, as bailor, without the knowledge of the bailee, and a loss occurred, his own being greater than the total insurance, the bailor can have no part in the proceeds.⁶ But where A. bailed goods with B., who assured A. that the goods were covered by policies that he, B., held, and they were so covered, B. was held bound to pay A. his fair proportion of the insurance received on the policies.⁷ A builder who contracts

¹ [Culbertson v. Cox, 29 Minn. 309.]

² [Providence County Bk. v. Benson, 24 Pick. 204 at 210.]

³ [Northrup v. Phillips, 99 Ill. 455.]

⁴ [Miltenerberger v. Beacom, 9 Pa. St. 198 at 201.]

⁵ [Reitenbach v. Johnson, 129 Mass. 316 at 317.]

⁶ [Stillwell v. Staples, 19 N. Y. 401 at 407.],

⁷ [Thomas v. Cumiskey, 108 Pa. St. 354.]

to construct a house cannot recover on the contract, or on a *quantum meruit*, unless he proves a complete performance, and if the structure burn just before completion the builder has no claim on insurance secured by the contractee on the work. The builder should have assured his own interest.¹ As between the vendee and vendor the insurance money represents the property itself, and equity will give it to the vendor to the extent of the purchase-money unpaid, in case of the insolvency of the vendee.² A testator bequeathed chattels to *B.*, and later insured them against loss by sea. He and the chattels were subsequently lost in a shipwreck, and it was held that *B.* had no interest in the insurance money.³ If it could have been shown that the testator perished first it would have been otherwise as to the insurance.]

[§ 452 B. **Extent of Mortgagee's Claim on the Proceeds.** — If the proceeds of a policy, in the name of a mortgagor, and payable to a mortgagee, are equal to or greater than the mortgage debt, the latter is paid when the mortgagees receive the insurance, and if there is a balance it belongs to the mortgagor.⁴ A mortgagee cannot claim to keep more than a compensation, and hold the balance for the owner, even where he insured his own interest only.⁵ In this case the mortgagee only needed \$128 to make him whole, after what he had received from other companies. The verdict, however, was for \$1,325, and it was held that there must be a new trial unless the parties consented to reduce the verdict to \$128. A mortgagee insuring is entitled to receive from the company no more than his debt *minus* what he receives from sale of the remnant of the insured property.⁶ But if the mortgagee insured to protect the owners as well as himself, or his action has been ratified by the owners, the fact that his own loss has

¹ [Lawing v. Rintles, 97 N. C. 350.]

² [Grange Mill Co. v. The People, 118 Ill. 396.]

³ [Durrant v. Friend, 11 Eng. Law & Eq. 2 at 4.]

⁴ [Klein v. Union Fire Ins. Co., 3 Ont. 234; Bull v. North Brit. Can. Invest. Co. & Imp. Fire Ins. Co., 14 Ont. R. 322; Schofield v. New B. Pat. Tanning Co., 22 N. B. 599.]

⁵ [Archbold v. Merchants' Mar. Ins. Co., 4 Russ. & Geld. (Nova Scotia) 98.]

⁶ [Harris v. Gasper Fire & Mar. Ins. Co., 9 R. I. 207 at 216.]

been satisfied by prior insurance will not prevent recovery.¹ The amount received by the mortgagee goes to the credit of the mortgage.² The clause, "Loss payable to the mortgagee," gives him the same rights as if the policy were assigned to him as collateral security for the mortgage debt.³ A mortgagee of the property has no claim on money paid for *its* loss, unless there is an assignment or agreement to that effect.⁴ By no principle of law or equity can a mortgagee claim the benefit of a policy underwritten for the mortgagor on the mortgaged premises.⁵ It is strictly a personal contract with which the mortgagee has no more to do than any other creditor.⁶ When the insured premises were twice mortgaged, and on a partial loss the money was paid, according to agreement, to the first mortgagee, and he in turn pays it to the mortgagor to repair the buildings damaged, the second mortgagee has no equity to compel a portion to be applied to the reduction of his debt.⁷ When a mortgagor assigns a policy of insurance to a mortgagee, the latter cannot apply the proceeds in case of loss to the debt before it is due, unless by consent of the former.⁸ An oral agreement between a mortgagor and mortgagee that any insurance received by the latter shall operate as a payment of the debt *pro tanto* is valid, and will affect the proceeds of any policy secured by the mortgagee.⁹

[§ 452 C. **Covenant to Insure for the Benefit of the Mortgagee.** — If by covenant, or otherwise, a mortgagor is bound to insure the mortgaged premises for the better security of the mortgagee, the latter has an equitable lien, to the extent of his interest in the property destroyed, upon the money due on a policy taken out by the mortgagor upon it.¹⁰ But such a

¹ [Seaman v. West, 5 Russ. & Geld. (Nova Sco.) 207.]

² [Troop v. Mosier, U. S. Eq. 189.]

³ [Conn. Mut. Life Ins. Co. v. Scammon, 4 Fed. Rep. 263.]

⁴ [Ridley v. Ennis, 70 Ala. 463.]

⁵ [Columbia Ins. Co. v. Lawrence, 10 Pet. 507 at 512; McDonald v. Black, 20 Ohio, 185 at 193.]

⁶ [Ryan v. Adamson, 57 Iowa, 30.]

⁷ [Gordon v. Ware Savings Bk., 115 Mass. 588 at 591.] ⁸ [Ibid.]

⁹ [Baker v. Fireman's Fund Ins. Co., 79 Cal. 34.]

¹⁰ [Wheeler v. Insurance Co., 101 U. S. 439, 442 (1879), citing Thomas' Adm'rs v. Vankapff's Ex'rs, 6 Gill & J. (Md.) 372, note to 3 Kent. Com. 376,

covenant does not run with the land, and the mortgagee cannot hold the vendee of the equity of redemption. If, however, the latter insures making the loss payable to the mortgagee, this provision cannot be revoked or cancelled without consent of the mortgagee.¹ Where A., after executing two mortgages, each of them covenanting to keep the premises insured for the benefit of the mortgagee, obtained insurance payable to the junior mortgagee to whom the policy was delivered, and who had no actual notice of the covenant in the senior mortgage, it was held that as the legal title to the insurance money was in the junior mortgagee, and the equities were equal, the legal title must prevail. The rule that in case of such a covenant any insurance obtained will be presumed a fulfilment, does not apply when the policy is in terms payable to another incumbrancer.² Where a mortgagor covenanted to insure for the benefit of the mortgagee, but in fact insured for himself and kept the policy, which covered not only the mortgaged property but much besides, and the loss was paid to the mortgagor, the company having no knowledge of the terms of the mortgage, it was held that the mortgagee could not sue the company on the policy.³

[§ 452 D. **Acts of the Mortgagor.** — If a policy, taken out by the owner, is made payable to mortgagees as their interest may appear, their rights cannot be destroyed by any act of the owner.⁴ A provision, however, that the mortgagee's interest in the policy shall not be affected by any act or neglect of the mortgagor and applicant, refers to *future* acts, and does not shut out proof that the policy was obtained by fraud.⁵ An indorsement on a policy that loss should be payable to A. B., mortgagee, to the extent of his interest, is not an assign-

and *Nichols v. Baxter*, 5 R. I. 491, the last to the effect that the lien exists although the agreement between the mortgagor and mortgagee provides that in case the former does not procure and assign the policy as agreed, the mortgagee may insure at the mortgagor's expense.]

¹ [*Reid v. McCrum*, 91 N. Y. 412.]

² [*Dunlop v. Avery*, 89 N. Y. 592.]

³ [*Stearns v. Quincy Mut. Fire Ins. Co.*, 124 Mass. 61.]

⁴ [*Black v. Nat. Ins. Co.*, 24 L. C. Jur. 65.]

⁵ [*Omnium Securities Co. v. Can. Fire & Mar. Ins. Co.*, 1 Ont. R. 494.]

ment of a *chose in action*, nor a contract to pay A. B., and where there has been a breach of condition A. B. cannot recover, either in his own name or that of the assured.¹ If a policy is payable to a mortgagee, an adjustment by the mortgagor without assent of the mortgagee does not bind the latter.² One to whom a loss is payable as his interest may appear has no greater rights than the insured. He is merely an appointee to receive a part of the money.³

[§ 452 E. **For whom it may concern.** — A policy “for whom it may concern” insures all having an insurable interest whether known to the insurer or not;⁴ and though issued to one having no interest therein may be sued on by the actual owners in case of loss.⁵ The policy covers the interest of any one who has given authority for such insurance, or ratifies it, and the ratification may be by bringing suit.⁶ Subject to the question of authority or ratification, such a policy covers the interests of all it was intended to protect by the person procuring it.⁷ A policy is not, however, a negotiable security,⁸ and the general clause “for whom it concerns” only relates to the person for whose benefit the policy was intended *at the time of issue*, and what person that was is a question for the jury. Parol evidence is admissible to show who is included in a policy written “for whom it may concern,” or “for the owners.”⁹ But it is held that there must be something in the policy to show that “others” are meant to be included. When one part-owner insured a vessel and its outfit in his own name only, with nothing in the policy to show that

¹ [Cormier v. Ottawa Agri. Ins. Co., 20 N. B. R. 526.]

² [Hall v. Association, 64 N. H. 405.]

³ [Hine v. Homestead Fire Ins. Co., 29 Hun, 84; Harrington v. Fitchburg Ins. Co., 124 Mass. 126 at 132.]

⁴ [The Sidney, 23 Fed. Rep. 88 (N. Y.), 1885.]

⁵ [Cobb v. N. E. Mut. Mar. Ins. Co., 6 Gray, 192 at 197-198.]

⁶ [Finney v. Fairhaven Ins. Co., 5 Met. 192 at 197; Seamans v. Loring, 4 Mason, 127 at 136.]

⁷ [Forgay v. Atlantic Mut. Ins. Co., 2 Rob. (N. Y.) 79 at 91.]

⁸ [Augusta Ins., &c. Co. v. Abbott, 12 Md. 348 at 373.]

⁹ [Bell v. Western Mar. & Fire Ins. Co., 5 Rob. (La.) 423 at 442; Catlett v. Pacific Ins. Co., 1 Wend. 561 at 575; Newson v. Douglas, 7 H. & J. (Md.) 417 at 451.]

it was for any one else, an action cannot be maintained by other co-owners with him, showing by parol testimony that the underwriters agreed to insure them all, and that it was so understood by all.¹ Where *A.* insured his own share in the firm of *A. B.*, the policy still retaining the printed form "for whomsoever else it may concern," the insurance will be held to be joint if such appears to have been *A.*'s intent.² Neither a mortgagor nor mortgagee can take advantage, as a rule, of a policy effected by the other, even though it contain the words "for whom it may concern," unless the mortgage has become absolute by failure to pay.³ But when the agent of the owners of a vessel effected an insurance for the benefit and on account of whom it may concern at the time of loss, it was held that a mortgagee of one of the owners had a right to the owner's share of the proceeds to the extent of his debt.⁴ Agents who have procured an open policy to "themselves, or whom it might concern," may sue thereon in their own names for the benefit of the owners.⁵

[§ 452 F. **Adjustment ; Compromise, &c.** — An adjustment fairly made is conclusive on the company.⁶ It is a new and independent agreement, — and in a suit upon it the company cannot set up any breach of warranty or condition in the policy.⁷ But an adjustment is never binding unless with full knowledge of the facts. Having the means of information is not sufficient.⁸ And it has been held in England that the signing of an adjustment by an underwriter, even with full knowledge of all facts, is not conclusive, but he may thereafter avail himself of any defence which the facts or the law of the case will furnish. Money paid cannot be recovered unless there is fraud or mistake, but a promise to pay is not binding

¹ [Finney v. Bedford Com. Ins. Co., 8 Met. 348 at 352.]

² [Lawrence v. Sebor, 2 Caines, 203 at 206.]

³ [McDonald v. Adm'r of Black, 20 Ohio, 185 at 194.]

⁴ [Rogers v. Traders' Ins. Co., 6 Paige Ch. 583 at 587.]

⁵ [Protection Ins. Co. v. Nilson, 6 Ohio St. 553 at 559.]

⁶ [Royal Ins. Co. v. Roodhouse, 25 Brad. 61, 66.]

⁷ [Godchaux v. Merchants' Mut. Ins. Co., 34 La. Ann. 235.]

⁸ [Shepherd v. Chewter, 1 Camp. 274 at 275; Remington v. Westchester Fire Ins. Co., 14 R. I. 245.]

unless there was a consideration or previous liability.¹ After an adjustment either the insured or the company may, upon clear proof, assert any right arising from facts not considered in the adjustment.² An adjustment and promise to pay may be avoided by the company on afterward discovering that there was a misrepresentation of title in the application.³ But where a loss of a vessel insured occurred, and when the company charged fraud and wilful negligence on the part of the master, the assured compromised for three-fourths of the claim, this was not set aside, because of the subsequent discovery by the company of further proof that the master scuttled the vessel.⁴ Mere ignorance of the rights the law attaches to the facts is not, however, sufficient to invalidate an adjustment. The compromise of a doubtful title when procured without such deceit as would vitiate any other contract concludes the parties, though ignorant of the extent of their rights, but if any undue advantage was taken it is void.⁵ When the assured, knowing the facts and his legal rights, yields to the arrogant claims and threats of the company and submits to an unjust settlement, there can be no relief for him.⁶ When a policy did not cover the loss, but the company promised the owner that "if he would find the property damaged, have it inspected and sold at auction," they would pay the deficiency, it was held that the performance of these conditions by the owner entitled him to the payment of the deficiency.⁷ A promise becomes binding on the performance by the promisee of that in consideration of which the promise was made. In an adjustment of claims with an insurance company the yielding of the claim of either party, or of a part thereof, is sufficient consideration for the other's promise to pay.⁸

¹ [Herbert v. Champion, 1 Camp. 134 at 137.]

² [Fire Ass. v. Blum, 63 Tex. 282.]

³ [Amer. Ins. Co. v. Barnett, 73 Mo. 364.]

⁴ [Barlow v. Ocean Ins. Co., 4 Met. 270 at 275.]

⁵ [Hoge v. Hoge, 1 Watts 163 at 217; Haigh v. Brooks, 10 Ad. & El. 309 at 318; Union Bk. v. Gray, 5 Pet. 99 at 114.]

⁶ [Mayhew v. Phoenix Ins. Co., 23 Mich. 105 at 108.]

⁷ [Willets v. Sun Mut. Co., 45 N. Y. 45.]

⁸ [Fire & Mar. Ins. Co. v. Chesnut, 50 Ill. 111.]

If the amount of liability is ascertained and not in dispute, an agreement to take less will not be enforced, unless additional security is given, or there is *some new* consideration.¹ An adjustment in which the loss is ascertained and stated, but there is no signature or promise of payment, will not estop the company from showing that the promise *implied* from such adjustment is without consideration. Such an adjustment is only *prima facie* evidence of the assured's right to recover the amount stated.² An adjustment fraudulently made may be set aside.³

¹ [Amer. Cent. Ins. Co. v. Sweetser, 116 Ind. 370; Douglass v. White, 3 Barb. Ch. 621 at 624.]

² [Fame Ins. Co. v. Norris, 18 Brad. 570.]

³ [Matthews v. Gen. Mut. /Ins. Co. of N. Y., 9 La. Ann. 590 at 591 (by the company for fraud of the insured).]

CHAPTER XXIII.

SUBROGATION.

ANALYSIS.

SUBROGATION —

A. Of insurer to remedies of assured.

1. None at common law as against one whose negligence or wrongful act caused the loss, especially in case of felony, § 453 ; the doctrine of this section, and of the case cited at length in the note, does not, however, commend itself as reasonable or just. If A. beats C., the latter may sue him and recover, and the fund goes into his estate, perhaps to his heirs and creditors. If A. beats C. a little harder, so that he dies, no recovery can be had, says the common law, therefore there is no right of action for the insurer to be subrogated to; moreover, the injury to the insurer depends on contract with C., and is too remote a consequence of A.'s action to make it proper to hold him. The latter objection is easily reduced to the absurd, for it applies equally to the mass of cases in which subrogation is allowed by common consent to be proper, and the doctrine that in case of a *small* injury restitution or compensation must be made to the estate, funds, and purposes of the injured person which have suffered by the wrong, but in case of a great injury, no such compensation is to be made by the wrongdoer carries in its very statement its own refutation.

To hold that if A. knocks a dead prop of wood from under C. so that he is injured, A. must make compensation, but if he takes away the living prop of a father's life from C., he owes him no compensation, is not justice.

the true doctrine is that a wrongdoer ought to make good the direct loss caused by his act, great or small, and it would have been more sensible in the common law to compel the murderer to make good to the estate of the deceased the fair value of his life on the principles of insurance, or reimburse the insurer, § 454.

the injured person may sue the wrongdoer first, and if he recovers, the insurer is released ; or he may sue the company first, and then the company may pursue the wrongdoer, in the name of the assured or his representatives. The guilty party must be made to bear the loss, § 454.

equity will restrain the assured from releasing the wrongdoer, § 454.

the company is treated as a surety, § 454.

the right of subrogation exists, although the company was not legally bound to pay the loss, § 454.

but does not arise until full payment has been made by the company, except in case of abandonment or express agreement to assign remedies to the insurer, § 454.

payment by a mere stranger, or volunteer, however, gives him no right of subrogation, § 456.

nor does such a payment release the insurer, § 456.

liability of town for acts of mob, § 454.

or defect of highway, § 455.

railroad liable to company for loss by sparks, § 454.

carrier's negligence, § 454.

the party liable for the wrong cannot take advantage of the payment of the loss by the company to reduce damages, § 455.

2. *Creditor*, § 456.

though company pays the creditor, he may still sue the debtor for his debt (?) § 456. See, however, §§ 456 *a*, 449, 452 *A*.

Company may recover insurance from lessee if lessor repairs under the lease, § 456 *a*.

so the insurer will be subrogated to the right of a vendor against a vendee who has paid only part of the price, §§ 456 *a*, 457; and may use any lien that the insured possesses, to the extent of the insurance paid by them, §§ 456 *a*, 457. If the sale is not complete at the time of loss, so that the loss is the vendor's, of course there is no room for subrogation, § 457. These doctrines carry out the principle that insurance is an indemnity. The defendant is no worse off than if there were no insurance, and he is not entitled to be a gainer by it unless he had forethought enough to have a part in securing it. Still it may be urged with some apparent force that the company has received premiums to take the risk of loss by fire, and it seems a little hard that an innocent vendee should have to bear the loss instead of the company that has been paid for that very purpose. A moment's consideration, however, shows that the vendee is not innocent in the very important respect that he neglected to insure himself.

The company cannot recover if the assured cannot, § 457.

except in some cases of special agreement, see § 457 *C*. nor can it recover more than it has paid, § 457.

and the suit must be in the name of the assured, §§ 454, 457.

3. *Carrier*, §§ 457 *A*, 457 *B*.

insurer of goods lost by carrier is subrogated at common law to insured's remedies against carrier, § 457 *A*.

and may recover the full value of the goods and 6 per cent interest, § 457 A.

although the insurer may have waived a valid defence against the assured, § 457 A.

the insurer is not entitled to commissions on sales of abandoned goods, § 457 B.

where the policy says "This insurance shall not inure to the benefit of the carrier," if the insured agrees with the carrier to give him the benefit of the insurance, neither of them can sue the insurer, § 457 A.

in the absence of fraud or of such a stipulation in the policy, the assured may^a release the carrier, or agree that he shall have the benefit of the insurance, and this defeats the subrogation of the insurer, § 457 B.

the carrier has no claim on the insurance except by express agreement, § 457 B.

4. *Mortgagor and Mortgagee*, §§ 456, 457 C, 458.

insurer paying mortgagee is subrogated to his rights at common law, § 457 C. (N. Y.). *Contra*, § 456, unless there is an express agreement. The mortgagee may recover from insurer and debtor both, § 456.

if the mortgagor procured the insurance, though making it payable to the mortgagee, or if he ultimately pays the premiums, the insurance is for his benefit and the insurer cannot rely on the mortgage, §§ 457 C, 456.

there is often a "mortgagee clause," stipulating that acts of the mortgagor shall not vitiate the policy, and that the company may on payment of the loss require an assignment of the mortgage to that extent, or entirely on payment of the mortgage debt, § 457 C.

the election in the latter case must be made within a reasonable time, § 457 C.

B. Of one person to rights of another against the insurer, or the insurance funds, see CARRIER, above in this analysis, and chap. xxii. analysis (5.)

ultimate title to proceeds, as between mortgagor and mortgagee, § 456.

vendor and vendee, § 456.

lessor and lessee, § 456.

debtor and creditor, § 456.

5. *Proximate Cause*. If a spark flying from a locomotive sets fire to a shed, and this burning spreads the fire to other buildings, the spark is the proximate cause of the loss of the latter buildings. The contrary has been held, but reason is clearly with the rule just stated. The spark is the proximate cause of the whole line of combustion it sets up, as much as a wound is the cause of the pains that follow from it in successive years, § 459.

car running over fire hose and severing it so that building burns, railroad responsible, § 459.

fire running from A.'s land to B.'s, § 459.

town tearing down building to stop fire, § 459.

§ 453. **Insurers ; Subrogation ; Remedy over of Insurer.** — The insurer does not, at common law, acquire by the payment of a loss a right in his own name to recover damages against the party by whose negligence and fraud the loss is caused.¹ One who wilfully sets fire to a building, or negligently destroys a life, and thus gives rise to claims against the insurers for losses which they have been obliged to pay, is not liable over to the insurers for the loss thus occasioned, unless there be in some way privity of contract between him and the insurers, or there is due from him towards them some special duty. If no special right of theirs as against him and no duty towards them is violated, they have no claim. The injury is too remote and indirect to constitute an injury in a legal sense. The man who kills another violates the rights of the deceased and his general duty to society ; but his misconduct affords to the creditor of the deceased no legal ground of action.² In the case just cited from Connecticut, where an insurance company had paid a loss for a death caused by the negligence of the railroad company, the court dismissed the action on two grounds : first, on the ground that at common law a party is not liable *civiliter* for the destruction of human life ;³ and, secondly, on the special ground that there is no such relationship between the parties as to lay a foundation for such an action.⁴ (See analysis at the head of this chapter.)

¹ London Ass. Co. *v.* Sainsbury, 3 Doug. 245.

² Rockingham Mut. Fire Ins. Co. *v.* Boshier, 39 Me. 253 ; Conn. Mut. Life Ins. Co. *v.* New York & New Haven R. R. Co., 25 Conn. 265 ; Anthony *v.* Slaid, 11 Met. (Mass.) 290.

³ Mobile Ins. Co. *v.* Brame, 95 U. S. 754. See also a very able criticism upon this rule by Dillon, J., in Sullivan *v.* Union Pacific Railroad Co., 3 Dill. C. Ct. 334. See also 2 Cen. L. J. pp. 47, 128.

⁴ The whole opinion is very able and interesting, and well worthy of perusal. So much of it as is devoted to the latter ground we give entire, in the words of Storrs, J.

"The defendants, a railroad company, are charged with having negligently occasioned the death of one Dr. Beach, by which event the plaintiffs, a life insurance company, have been compelled to pay to his representatives the amount of an insurance effected upon his life, of which amount a recovery is sought in this action. A plea in bar sets forth a payment to the administratrix of the deceased of the damages for which the defendant's negligence had rendered them legally liable, and also a discharge by her. This plea and the demurrer thereto

§ 454. **Loss ; Right of Subrogation ; Wrong-doer.** — But in all those cases where the insured have a primary right against require no examination, as they are immaterial in the view which we take of the declaration.

“ It is clear, from the declaration, that a pecuniary injury has been sustained by the plaintiffs in consequence of the unlawful conduct of the defendants. If the injury thus set forth be actionable, or an injury in a legal sense, there must be a recovery. But we are of the opinion that the wrong complained of is not the proper subject of a suit at law, both for reasons appertaining to the peculiar nature of the injury and to the manner in which its consequences are brought home to the party claiming redress.

“ The other branch of our inquiry, relating to the manner in which the injury complained of was brought home to the party claiming to have suffered by it, concerns principles of great practical interest, and novel in their present application. The plaintiffs sustain no relation to the authors of the wrong other than that of mere contractors with the party injured, and their contract liability is the medium through which the injury is brought home to them. They justly say that their loss is in fact distinctly traceable and solely due to the misconduct of the defendants ; that the death of Dr. Beach, caused by the defendants, in a legal sense determined the only contingency out of which their liability grew, and brought upon them the consequences of that liability which, through the defendants' unlawful acts, had now become fixed. Still the question remains, notwithstanding this precise exhibition of cause and effect, whether these consequences, of which the deceased was primarily the subject, and which affected the plaintiffs only because they had put themselves into the position of contractors with him, were in a legal view brought home to the plaintiffs, directly or indirectly. The completeness of the proof of connection between the acts of the defendants and the loss of the plaintiffs does not vary, although it may tend to confuse the aspects of the case. The single question is whether a plaintiff can successfully claim a legal injury to himself from another, because the latter has injured a third person in such a manner that the plaintiffs' contract liabilities are thereby affected. An individual slanders a merchant and ruins his business ; is the wrong-doer liable to all the persons who, in consequence of their relations by contract to the bankrupt, can be clearly shown to have been damnified by the bankruptcy ? Can a fire insurance company, who have been subjected to loss by the burning of a building, resort to the responsible author of the injury, who had no design of affecting their interest, in their own name and right ? Such are the complications of human affairs, so endless and far-reaching the mutual promises of man to man, in business and in matters of money and property, that rarely is a death produced by human agency which does not affect the pecuniary interest of those to whom the deceased was bound by contract. To open the door of legal redress to wrongs received through the mere voluntary and factitious relation of a contractor with the immediate subject of the injury, would be to encourage collusion and extravagant contracts between men, by which the death of either, through the involuntary default of others, might be made a source of splendid profits to the other, and would also invite a system of litigation more portentous than our jurisprudence has yet known. So self evident is the principle that an

third parties, who have been the authors of the injury either through negligence or culpable misconduct not amounting to

injury thus suffered is indirectly brought home to the party seeking compensation for it, that courts have rarely been called upon to promulgate such a doctrine. The case, however, of *Anthony v. Slaid*, 11 Met. 290, referred to at the bar, is in point. A contractor for the support of paupers had been subjected to extra expense, by means of a beating which one of those paupers had received, and he sought from the assailant a recovery of the expenditure. But the court held that the damage was remote and indirect, having been sustained not by means of any natural or legal relation between the plaintiff and the party injured, but by means of the special contract by which he had undertaken to support the town paupers.

"The case, however, would present a different aspect, if by virtue of the contract between the railroad company and the deceased, a direct relation was established between the former and the insurers. If the contract for the transportation of Dr. Beach safely, either in its terms or through its necessary legal incidents, or by fair inference as to the intent of the parties, devolved upon the railroad company a duty towards the present plaintiffs, the latter might sue for a violation of that duty. An obligation thus imposed will not always require a suit for its breach to be brought by a party to the contract; an independent right of action resides in the party to whom the duty was to be performed. In this respect there is no difference between an obligation imposed by law and by contract. Where the duty of keeping a highway is lodged in a certain quarter by statute, the way is to be kept in repair for the public, for everybody; and when any person is injured by its defects, the breach of duty is to him, and he has an action for the violation of his right. If a stage-coach proprietor agrees with a master to carry his servant, and injures the latter on the road, he is liable directly to the servant; for although undertaken at the request of and by agreement with another, the duty was directly to the party injured. *Longmeid et ux. v. Holliday*, 6 Eng. L. & Eq. 562. But it is evident that the present case cannot be brought within the principle of such decisions. It would be unfair to argue that when two parties make a contract, they design to provide for an obligation to any other persons than themselves and those named expressly therein, or to such as are naturally within the direct scope of the duties and obligations prescribed by the agreement. On this point it is enough to say that when an agreement is entered into, neither party contemplates the requirement from the other of a duty towards all the persons to whom he may have a relation by numberless private contracts, and who may therefore be affected by the breach of the other's undertakings. We cannot find that any public law charged the present defendants with any duty to the plaintiffs, regarding Dr. Beach's life, nor can we see that Dr. Beach exacted, either expressly or by reasonable intentment, any obligation from the defendants towards the insurers of his life, when he contracted for his transportation to New York. Had the life of Dr. Beach been taken with intent to injure the plaintiffs, through their contract liability, a different question would arise, inasmuch as every man owes a duty to every other not intentionally to injure him.

"We decide that in the absence of any privity of contract between the plaintiff and defendants, and of any direct obligation of the latter to the former

felony, the insurers on making good the loss are entitled to enforce the remedy of the assured, and in their name to recoup themselves for their expenditure. This right is recognized by the courts as the right of subrogation. The contract of insurance is treated as an indemnity, and the insurer as a

growing out of the contract or relation between the insured and the defendants, the loss of the plaintiffs, although due to the acts of the railroad company, being brought home to the insurers only through their artificial relation of contractors with the party who was the immediate subject of the wrong done by the railroad company, was a remote and indirect consequence of the misconduct of the defendants, and not actionable.

"Since the determination of this case, we have observed a decision, recently made in Maine, *Rockingham Mut. Fire Ins. Co. v. Boshier*, 39 Me. 253, fully confirming the legal theory which we have advanced. The suit was brought against a party who had wilfully fired a store, by the insurance company, who had paid the consequent loss, and in their own name. The court dismissed the action on demurrer, taking the same view of the common-law doctrine which we have expressed relative to the indirect and remote manner in which the interests of the insurer were prejudiced by the misconduct of the wrong-doer. The cases in which insurers have been permitted to recover against the authors of those losses are not in contravention of these principles. They have recovered not by color of their own legal right, but under a general doctrine of equity jurisprudence, commonly known as the doctrine of subrogation, applicable to all cases wherein a party who has indemnified another in pursuance of his obligation so to do, succeeds to and is entitled to a cession of all the means of redress held by the party indemnified against the party who has occasioned the loss. In some instances the doctrine has been carried so far that an insurer has been permitted to recover from the insured such compensation as the latter has subsequently obtained from the wrong-doer, as if the money paid by the tortfeasor under such circumstances was really paid for the use of the insurer. By virtue of this doctrine there is no doubt of the right of an insurer, who has paid a loss, to use the name of the insured in order to obtain redress from the author of the wrong, — a right to be exercised for the benefit of the party equitably entitled to its benefits, not to be enforced by its possessor in his own name, but by him as the successor to the remedies of the person whom he has indemnified. Having no independent claim on the wrong-doer, he might be successfully met by the superior equities of the wrong-doer, such, for instance, as a payment to the party directly injured, without notice of the insurer's claim to be subrogated. Nothing can be plainer than that an indirect liability of this kind is an argument rather against the claim of a direct responsibility of the wrong-doer than a suggestion in its favor. The views taken by courts in recognizing the insurer's right of subrogation tend to sustain the principle which we now maintain." See also *Propeller Monticello*, 17 How 152, 154; *Mason v. Sainsbury*, 26 E. C. L. 36; 3 Doug. 61; *Yates v. Whyte*, 4 Bing New Cas. 272; *Quebec Fire Ins. Co. v. St. Louis*, 22 Eng. L. & Eq. 73; *Quebec Fire Ins. Co. v. Molson et al.*, 1 L. C. Rep. 222; *Hart v. W. R. Co.*, 13 Met. 99, *Bean v. At. & St. Law. R. R. Co.*, 58 Me. 82.

surety who is entitled to all the remedies and securities of the assured, and to stand in his place. If the insurers were first liable, payment by them would be a satisfaction and relieve the wrong-doer; but this is not so, for the latter is first liable. The assured have, indeed, a double remedy;¹ if they pursue that against the wrong-doer and recover compensation, the insurers escape, but if they choose to enforce the claim against the insurers in the first instance, the latter are entitled to use the name of the assured in an action to recover the money which they have paid.² And the right is based upon the equitable doctrine that where one has been obliged to pay money to another by the non-feasance or misfeasance of a third, who, being at fault, ought to bear the loss, the party so paying, as by his direct obligation towards the party suffering the loss he may be compelled to do, shall be allowed, indirectly and through the right which the injured party had, to compel the wrong-doer to bear the burden which was imposed by his fault; although between him and the wrong-doer there is no direct relation upon which to found a cause of action. In other words, the party injured being so situated that he may call, by his right at law, upon the party who is responsible for the injury, or, by his contract, upon one who is not at fault, for his indemnity; if he elect the latter, then the latter shall be allowed to do, in his name, what in the first instance the injured party might have done, and justice, as between all the parties, decrees ought to be done. And this result is accomplished by the courts when suit is brought by the insurers in the name of the insured, by holding that the payment of the money to the latter is no satisfaction of the latter's claim against the wrong-doer. The liability of the wrong-doer is in legal effect first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability. And where the insured insists upon his remedy against the party secondarily liable, he is conscientiously bound to make an assignment, in equity, to the person entitled to the benefit, and the acceptance of the indemnity from

¹ *Burrows v. March Ins. Co.*, L. R. 5 Exch. Cas. 68, 7 Exch. 96.

² *Bunyon Fire Ins.* 165.

the insurers is in the nature of an equitable assignment, which authorizes the assignor to sue, in the name of the assignee, for his own benefit. And this is a right which a court of equity will support, by restraining and prohibiting the assignee from defeating it by a release. Thus where a house was destroyed by a mob, and the insurers paid the loss, a suit against the hundred which were primarily responsible was maintained in the name of the insured, but for the benefit of the insurers.¹ So where the underwriters have paid a loss occasioned by sparks from a locomotive, they may recover from the railroad company the amount thus paid, in a suit in the name of the owner of the property destroyed, which action the owner cannot control.² [Or if the insured has recovered from the railroad company as well as from the insurer, the latter may claim the excess above indemnity to the assured.³] So where the loss is entailed by the negligence⁴ of a common carrier, whereby the goods intrusted to his care are destroyed by fire. As between a common carrier of goods and the insurer the liability for their loss is primarily upon the carrier, while the liability of the insurer is only secondary. In respect to the ownership of the goods and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract, or for a non-performance of his legal duty. The insurer stands practically in the position of a surety, and whenever he has indemnified the owner for the loss, he is entitled to all the

¹ *Mason v. Sainsbury*, 3 Doug. 61; *Conn. Mut. Life Ins. Co. v. R. R. Co.*, *supra*, § 453. As to the liability for negligence at common law, see also *Yates v. Whyte*, 4 Bing. N. C. 272; *Quebec Fire Ins. Co. v. St. Louis*, 22 Eng. L. & Eq. 73; *Clark v. Inhabitants of Blything*, 2 B. & C. 254; *Ryan v. N. Y. Central R. R. Co.*, 352; *Webb v. Rome, &c. R. R. Co.*, 49 N. Y. 421. As to when notice before suit is necessary, see *Hough v. Aetna Life Ins. Co.*, 52 Ill. 318.

² *Hart v. Western R. R. Co.*, 13 Met. (Mass.) 99; *Monmouth Insurance Co. v. Hutchinson*, 21 N. J. Eq. 107; *Conn. Fire Insurance Co. v. Railway Co.*, 73 N. Y. 399.

³ [*Hartford Ins. Co. v. Pennell*, 2 Ill. Ap. 609 at 614.]

⁴ [A company paying the loss caused by the negligence of a railroad, is subrogated to the rights of the owner against the road. *Holcombe v. Richmond, &c. R. Co.*, 78 Ga. 776.]

means of indemnity which the satisfied owner held against the carrier. This right depends not upon privity of contract, but is worked out through the right of the creditor or owner, and in his name;¹ and exists although the insurer was not legally bound to indemnify the insured for the loss he sustained.² So, where a house is wilfully burned by a third person, or a life is lost by the negligence of a steamboat or railroad company. But in all such cases the action must be brought in the name of the party directly injured, or his legal representatives, and an action in the name of the third party will not be sustained.³ And several parties injured may join in the same action.⁴ This right of subrogation does not, however, accrue until full payment of the liability which gives rise to such right on the part of the insurance company claiming to be subrogated.⁵ [It is true that in marine insurance an abandonment passes to the insurers all claims and rights of the insured, and they can sue the person whose negligence

¹ *Hall v. Nash. & Chat. R. R. Co.*, 13 Wall. (U. S.) 367; *Gales v. Hailman*, 11 Pa. St. 515; *Georgia Ins. Co. v. Dawson*, 2 Gill (Md.), 365.

² *Insurance Co. v. The "C. D., Jr."*, 1 Wood (U. S. C. Ct.), 72; *Monticello v. Mollison*, 17 How. (U. S.) 152.

³ *Rockingham Mut. Fire Ins. Co. v. Bosher*, 39 Me. 253; *Peoria Mar. & Fire Ins. Co. v. Frost*, 37 Ill. 333; *Conn. Mut. Life Ins. Co. v. N. Y. & N. H. R. R. Co.*, 25 Conn. 265; *Ætna Ins. Co. v. Han. & St. Joseph R. R.*, 3 Dill. C. Ct. 1. In Lower Canada, however, where a church was set on fire and burned by the sparks from a passing steamboat, which had no grille on its chimney, the insurance company were allowed, after having paid the loss, after a transfer of the claim against the company, but without any legal assignment thereof by the church proprietors, to maintain in their own name an action against the steamboat company to recover the amount they had been compelled to pay under the policy. *Quebec Fire Ass. Co. v. St. Louis*, 1 L. C. 222. This case turned upon the peculiarities of the French law, and was affirmed in the Privy Council, 22 Eng. L. & Eq. 73. So in admiralty, *Amazon Ins. Co. v. Steamboat*, 6 Ins. L. J. 155. See also *Kentucky Ins. Co. v. Railway Co. (Tenn.)*, 6 Ins. L. J. 328; *Monticello v. Mollison*, 17 How. (U. S.) 152; *St. Paul's Ins. Co. v. Steamboat*, U. S. Dist. Ct. (Mich.), 5 Ins. L. J. 73.

⁴ *Swarthout et al. v. Chicago R. R. Co.*, 49 Wis. 629.

⁵ *People's Ins. Co. v. Straehle*, 2 Cincinnati Sup. Ct. Reporter, 186; *Neptune Ins. Co. v. Dorsey*, 3 Md. Ch. 334, 338; *Kyner v. Kyner*, 6 Watts (Pa.), 221. It has been held, however, that after an abandonment in marine insurance the insurer supervenes to all the rights of the insured, and may maintain a libel, although he has not, before bringing it, paid the loss. *Traders' Ins. Co. v. Propeller Manistee*, 5 Biss. C. Ct. 381.

caused the loss, before they have paid the policy;¹ and that in fire insurance a special agreeing to assign to the insurer an interest in the mortgage or deed of trust, equal to the loss paid, is a condition precedent to recovery by the insured.² When the insured covenants that on receiving payment he will assign to the company any claims he may have against any one whose negligence or fault may have caused the loss, refusal of the insured to make the assignment before or concurrent with the payment is a good defence to a suit.³ But where there is no express covenant, no subrogation can be demanded until the company has paid the loss, and the insured may settle with and release the negligent party as to damage other than that insured without affecting his remedy against the insurer. If, however, the insured recovers from the negligent person for the whole loss, he cannot afterward sue the insurer.⁴] This liability for negligence existed at common law;⁵ and in some of the States is imposed by statute, without regard to the question of negligence. [A town insurance company, paying a loss arising from the negligence of a railroad, may take an assignment of the claim for damages against the railway and recover from it in full.⁶ Freight to be earned is no incident to the ownership of the vessel, and the company is not entitled to the benefit of any damages recovered from the owners of the wrong-doing ship on account of loss of freight.⁷ An insurer paying the loss by collision may sue the colliding vessel for damages.⁸ When both the master and the insurers are liable to the assured, and there is an abandonment for a total loss and the insurers pay, they may be subrogated to the rights of the assured against the master.⁹ The

¹ [The Manistee, 5 Biss. 381 at 384.]

² [Dick v. Franklin Fire Ins. Co., 81 Mo. 103.]

³ [Niagara Fire Ins. Co. v. Fidelity, &c. Co., 123 Pa. St. 516.]

⁴ [Insurance Co. v. Fidelity, &c. Co., id. 523.]

⁵ Canterbury v. Attorney-General, 1 Phil. 306; Pigot v. Eastern Counties Railway Co., 3 C. B. 229; Aldridge v. Great West. Railway Co., 3 M. & G. 515; Longman v. Grand Junction Canal Co., 3 F. & F. 736, 738.

⁶ [Hustisford F. M. Ins. Co. v. C. M. & St. P. R. Co., 66 Wis. 58.]

⁷ [Sea Ins. Co. v. Hadden, 13 Q. B. D. 706.]

⁸ [The Frank G. Fowler, 8 Fed. Rep. 360, S. Dist. of N. Y. 1881.]

⁹ [Atlantic Ins. Co. v. Storrow, 5 Paige, 285 at 294.]

company is entitled to have the amount recovered by the insured from the wrong-doer brought into account with the insurance, and if the two more than cover the loss and all expenses of the insured in the matter, so that he is better off than if no accident had happened, the company is entitled to the benefit of the excess, to the extent of their liability.^{1]}

§ 455. **Loss ; Subrogation ; Wrong-doer can have no benefit from Payment by the Insurer.** — The principles stated in the last section were further illustrated in a recent case in Vermont,² where a town which was sued for injuries resulting from a defect in a highway undertook to claim in its behalf, by way of reduction of damages, the amount which had been paid the plaintiff by an insurance company. But the court said there was no technical ground which necessarily leads to the conclusion that the money received by the plaintiff of the accident insurance company should operate as a defence *pro tanto*, or inure to the benefit of the town. The insurer and the defendant are not joint tortfeasors or joint debtors, so as to make a payment or satisfaction by the former operate to the benefit of the latter. Nor is there any legal privity between the defendant and the insurer, so as to give the former a right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff and at his expense, and to the procurement of which the defendant was in no way contributory, and there is no legal principle which seems to require that he should have any benefit therefrom. To the suggestion that the plaintiff was entitled to but one satisfaction for the injury, the reply was, that if this was to be regarded as a correct proposition, the question would arise whether the defendant stands in a position which entitles him to make the objection. And this depends upon another question, Who, as between the insurer and the defendant, ought to pay the damage? which of the two ought necessarily to make compensation to the plaintiff, and ultimately

¹ [National Fire Ins. Co. v. McLaren, 12 Ont. R. 682.]

² Harding v. Townshend, 43 Vt. 536.

to bear the loss? If the insurer ought ultimately to bear the loss, the defendant is entitled in this action to have the benefit of that payment; but if the defendant ought ultimately to bear the loss, then the payment by the insurer, and the collection of the entire damage of the defendant, only creates an equity between the plaintiff and the insurer, to be ultimately adjusted between them, in which the defendant has no interest, and with which he has no concern.¹ [When a sheriff wrongfully took goods of A. which were insured, and A. recovered on the policy (the goods being destroyed while in the sheriff's possession), it was held that he could recover also in trespass for the full value of the goods, the wrong-doer having nothing to do with the other payment.² The insurance on the property and transactions between the insurer and assured as to payment of loss have nothing to do with the extent of the liability of one who has maliciously burned insured's property.³ Nor can they be given in evidence in mitigation of damages when the negligence of the third party is in question.⁴]

§ 456. **Loss; Subrogation; Intervention of Strangers to the Contract; Debtor and Creditor; Mortgagor and Mortgagee; Vendor and Vendee; Lessor and Lessee.** — But this right of subrogation is based upon the fact that the person who pays the debt stands in the position of a surety, or is compelled to pay to protect his own interest, as where one is surety for another that he will account for moneys. A mere stranger or volunteer having no interested relationship to the parties, who pays the debt of another, cannot be subrogated to the creditor's

¹ See also *Mason v. Sainsbury*, 3 Doug. 61; *Clark v. Inhabitants of Blything*, 2 B. & C. 254; *Yates v. White et al.*, 4 Bing. N. C. 272; *Monticello v. Mollison*, 17 How. (U. S.) 152, which were cited by the court as authorities upon the first point; *Anonymous*, 4 Ins. L. J. 158; *Merrick v. Brainard*, 34 N. Y. 208; *Weber v. Morris & Essex R. R.*, 35 N. J. 409. The case of *Pym v. Great Northern Railway Co.*, 4 B. & S. 396, if not distinguishable, is opposed by *Althorff v. Wolf*, 22 N. Y. 355. And the same may be said of *Hicks v. Newport Railway Co.*, an unreported case at *Nisi Prius*, referred to in a note to *Althorff v. Wolf*, decided under Lord Campbell's Act, 4 Ins. L. J. 158.

² [*Perrott v. Shearer*, 17 Mich. 48 at 56.]

³ [*Hayward v. Cain*, 105 Mass. 213 at 214.]

⁴ [*Collins v. N. Y. Central, &c. R. R.*, 5 Hun, 503 at 506.]

rights.¹ On the other hand, if a stranger to the contract sees fit to donate to the insured the amount of any loss he may have suffered, this will not relieve the insurers from their obligation to perform their contract.² Not even the insurers can intervene and intercept, or lay successful claim to a debt or its securities, when they are neither directly nor indirectly affected by the conduct of the creditor, or authorized by his consent. The insurers of the prompt payment of a note are not entitled to the note itself on payment, unless by special agreement. The note is still the property of the insured *valeat quantum*.³ Nor can they require the insured to enforce a prior claim, — the mechanic his lien, for instance, — before calling on them for indemnity.⁴ A creditor to whom a policy is made payable, and who has promised the insured, his debtor, to pay off certain other debts of the insured, may recover and hold the proceeds of the insurance in trust for his debtor against any claims of the insurer to subrogation against the insured, notwithstanding the creditor may have been fully paid.⁵ A mortgagee who insures generally, and at the time declares his purpose, but not otherwise, to cover the mortgagor's interest, may recover the full amount of the loss.⁶ So the assignee of a mortgage for a consideration, only part of which he has paid, may recover the whole amount of the sum agreed to be paid, though the mortgaged property was sold for more than he had actually paid; nor can he be first required by the insurers to exhaust his remedy on the mortgage before he can call upon the insurers.⁷ The facts that the

¹ *Hough v. Ætna Life Ins. Co.*, 57 Ill. 318.

² *People's Ins. Co. v. Straehle*, 2 Cincinnati Sup. Ct. Reporter, 186; *ante*, § 116.

³ *Mayer v. Legrand*, Dalloz, Jur. Gén., 1870, 218.

⁴ *Royal Ins. Co. v. Stinson*, Sup. Ct. U. S., 11 Repr. 689.

⁵ *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619.

⁶ *Richardson v. Home Ins. Co.*, 21 U. C. (C. P.) 291; *Hazard v. Canada Agr. Ins. Co.*, 39 U. C. (Q. B.) 419.

⁷ *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 359. In this case the ground is taken that the insurance of a mortgagee's interest is an insurance of the property and not of the debt, controverting the *dicta* in *Ætna Ins. Co. v. Tyler*, 16 Wend. 385. *Carpenter v. Prov. Ins. Co.*, 16 Pet. (U. S.) 495; *Smith v. Columbian Ins. Co.*, 17 Pa. St. 283, and *Kernochan v. Barry Ins. Co.*, 17 N. Y. 428, apparently to the contrary.

property after the fire is sufficient security for the debt, and that it has been restored by the mortgagor, constitute no defence in behalf of the insurers, nor are they entitled to be subrogated to the mortgagor's rights.¹ Indeed it may be stated, as a general rule, that no one, except the nominal assured, or his assignee after loss, can claim either from the insurers, or from the party to whom the loss has been paid, any part of the proceeds of a policy, unless by express agreement, or unless the policy covered property in which the claimant had an interest, and was intended and was effected in part or in whole for his benefit and at his expense.² Thus a mortgagor cannot recover from a mortgagee except under such circumstances;³ nor a mortgagee from a mortgagor;⁴ nor a consignor from a consignee;⁵ nor a vendee from a vendor, who, not having assigned the policy, had, after loss of the property sold, collected the insurance;⁶ nor a vendor from a vendee;⁷ nor a lessor from a lessee;⁸ nor a lessee from a lessor;⁹ nor a debtor from a creditor.¹⁰ In order to give the right to intervene between the insurer and the insured, the party intervening must have some relation to, or concern

¹ *Ætna Ins. Co. v. Baker* (Ill.), 10 Ins. L. J. 275; *ante*, § 424.

² *Steele v. Franklin Fire Ins. Co.*, 17 Pa. St. 290; *Turner v. Stettis*, 28 Ala. 420. And see *ante*, § 424. [The text was quoted and approved in *Galyon & Co. for use, &c. v. Ketchen*, 85 Tenn. 55, 59, where it was decided that the holder of a mechanics' lien has no claim on insurance effected by the owner and assigned to a mortgagee of the property after loss, but before the lienor's bill was filed.]

³ *White v. Brown*, 2 Cush. (Mass.) 412; *Cushing v. Thompson*, 34 Me. 496; *Concord Mut. Fire Ins. Co. v. Woodbury*, 45 id. 447; *McPherson v. Proudfoot*, 2 U. C. (C. P.) 57; *Bunyon Fire Ins.*, 150, *b, c, and d*. [Where a mortgagee obtains a policy on his own account, and the premiums are not paid by or charged to the mortgagor, the latter cannot claim the benefit of it. *Pendleton v. Elliott*, 67 Mich. 496, citing *Stinchfield v. Milliken*, 71 Me. 567; *Insurance Co. v. Woodbury*, 45 Me. 447; *White v. Brown*, 2 Cush. 412.]

⁴ *Kansas Ins. Co. v. Berry*, 8 Kans. 159.

⁵ *Stillwell v. Staples*, 19 N. Y. 401, reversing same case in 6 Duer (N. Y.), 63.

⁶ *King v. Preston*, 11 La. Ann. 95; *Rayner v. Preston*, 28 W. R. 808; s. c. 10 Ins. L. J. 556; *Poole v. Adams*, 12 W. R. 683.

⁷ *Hammer v. Johnson*, 44 Ill. 192; *Wood v. Northwestern Ins. Co.*, 46 N. Y. 421.

⁸ *Merchants' Ins. Co. v. Mazange*, 22 Ala. 168; *Ely v. Ely*, 80 Ill. 532.

⁹ *Miltenberger v. Beacom*, 9 Pa. St. 198; *Tongue v. Nutwell*, 31 Md. 302.

¹⁰ *Bruce v. Garden*, 22 L. T. n. s. 595; *Henson v. Blackwell*, 4 Hare, Ch. 434.

with, the contract of insurance, as where the mortgagee insures in his own name, but at the request and at the expense of the mortgagor. In such case, upon payment of the debt the mortgagor may recover the insurance in the name of the mortgagee.¹ [If a mortgagor covenants to insure for the benefit of the mortgagee, the latter may equitably claim the proceeds of a prior policy taken out by the mortgagor.² Where parties having a demand against the owner of a vessel for money disbursed on it, take out a policy to cover the sum, loss payable to them or whom it may concern, and the following day receive a letter from the owner requesting them to have their advances insured so as not to call on the owner in case of loss, and they replied that they had covered the amount, the letters amount to a declaration of trust, or an agreement that the insurance should be for the benefit of the owner.³] Where the vendee, before title obtained, insures, and suffers loss, whereby the contract is rescinded, he holds the insurance money, without obligation to account to the vendor.⁴ A creditor who acquires title to an estate under a levy of execution, the time for redemption having expired, has no relation to, or concern with, a contract of insurance between the former owner of the estate and the insurers, upon which to found a claim upon the latter for the amount of the loss, or any part of it.⁵ But a purchaser under a decree of sale will be entitled to the proceeds of the policy, if the loss happen after the sale, but before its confirmation.⁶ Payment to a creditor by an insurance company of the amount of a policy taken out and paid for by him on the life of the debtor, is not *pro tanto* a satisfaction of the debt, but the debt still remains a valid security for its full amount against the debtor.⁷ [An insurance by a mortgagee is probably not an insurance of the debt in any such sense that payment of

¹ *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442; *ante*, § 450.

² [*Ames v. Richardson*, 29 Minn. 330.]

³ [*Phenix Ins. Co. v. Parsons*, 56 N. Y. Super. 423.]

⁴ *Bartlett v. Looney*, 3 Vict. Law Rep. E. 15.

⁵ *Plimpton v. Farmers' Mut. Fire Ins. Co.*, 43 Vt. 497.

⁶ *Gates v. Smith*, 4 Ed. (N. Y.) Ch. 702; *Ex parte Minor*, 11 Ves. 559.

⁷ *Humphrey v. Arabin*, Lloyd & Goold, Ch. 318.

the policy would satisfy the mortgage.^{1]} And the mortgagee may recover, notwithstanding, since the loss he has foreclosed under the mortgage.² Nor can a mortgagee under such circumstances, paid by the insurers, be compelled to assign his mortgage debt to the insurers.³ [An insurer cannot claim to be subrogated to a mortgage on paying a loss less than the whole mortgage debt.^{4]} But it has been held in New York⁵ that where the mortgagor insures, and with assent of the company assigns to the mortgagee, the latter could only recover for a loss on condition of assigning to the insurers an interest in the mortgage equal to the amount paid by them.⁶

§ 456 a. **Insurer ; Insured ; Lessee.** — In a very recent case in England, by a strict, not to say new, application of the principle that a contract of fire insurance is a contract of indemnity, the insured, who had obtained his indemnity, and afterwards had the damaged property restored, was obliged to surrender the indemnity. The facts were that one F. leased his house to B., under a lease which bound B. to repair. F. insured the house, which was destroyed by an explosion insured against, and obtained his indemnity from the insurers. B. afterwards repaired, as he was bound to do by his lease, with money he obtained from the town for injury to his leasehold estate ; whereupon the insurers brought suit against the assignee of the insured, to whom the indemnity had been paid, and were held entitled to recover, upon the general principle that a policy of fire insurance is a contract of indemnity, and that upon payment of the amount of loss the insurer is entitled to be put into the place of the insured ; and if at a subsequent time the insured receives compensation from other sources for the loss sustained by him, the insurer is entitled to recover from the insured any sum which

¹ [Louden v. Waddle, 98 Pa. St. 242.]

² Hadley v. New Hampshire Ins. Co., 55 N. H. 110.

³ King v. State Mut. Fire Ins. Co., 7 Cush. (Mass.) 1 ; Suffolk Fire Ins. Co. v. Boyden, 9 Allen (Mass.), 123. *Contra*, Honore v. Lamar Ins. Co., 51 Ill. 409.

⁴ [Phenix Ins. Co. v. First Nat. Bank, 18 Ins. L. J. 362 (Va.) Feb. 1889.]

⁵ Kip v. Mut. Fire Ins. Co., 4 Edw. Ch. (N. Y.) 86.

⁶ See also *ante*, § 379. In Canada the law upon this point is unsettled. Black v. National Ins. Co., (Q. B., Montreal), 3 Legal News, 29.

he may have received from the former in excess of the loss actually sustained.¹ [In a later English case the doctrine was very clearly stated. Where the owner has made a contract for sale of the property and it is damaged by fire, for which he receives the insurance, and afterward obtains the full price agreed on from the vendee, with no reduction on account of the insurance, the company can recover the insurance money. As between the insurer and the insured, the former is entitled to the advantage of every right of the assured, whether such right exists in contract fulfilled or not, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised, or has accrued (whether such right could or could not be enforced by the

¹ *Darrell v. Tibbitts*, 5 Q. B. D. 560 (1880), referring to and following *North British, &c. Ins. Co. v. London, &c. Ins. Co.*, 5 Ch. D. 569 (*ante*, § 436 a), which was a controversy about contribution between two companies, and in which, it is said, it was settled that the contract of fire insurance is a contract of indemnity. That the contract is one of indemnity has been heretofore conceded elsewhere than in England as elementary. Nor are we aware that it has ever been seriously controverted. But it has been supposed that the insurer contracts that *he* will indemnify. Whether, however, this application of the doctrine will receive the approval of our courts remains to be seen. It certainly deals rather summarily with rights acquired under lawful contracts lawfully executed, where the considerations are equivalents (*ante*, § 107, *sub finem*), which cannot be rescinded or modified except by the parties thereto. It should be added, that when the insurers paid over the indemnity they did not know that the lessee was bound to repair. But why is not the lessee's contract also a contract of indemnity? If both are to indemnify, why should the latter suffer the whole loss? See *ante*, §§ 116, 424. *Lush, J.*, gave judgment for the defendant in the court below. In the Court of Appeal, judgment reversed by *Brett, Cotton, and Thesiger, JJ.* See also *Burnand v. Rodocanachi*, 5 C. P. D. 424, before *Coleridge, C. J.*, and a jury. In *Freedmansdorf v. Watertown Ins. Co.*, C. Ct. (Ill.), *Blodgett, J.*, held that where the policy was insured to the mortgagor, payable in case of loss to the mortgagee, both in the courts of Illinois and in the courts of the United States the suit must be in the name of the mortgagor, and intimated that, if it were otherwise, the mortgagee would have no right of action if the premises had been repaired, as the contract with him was only that the property should remain unimpaired as security. See also *Excelsior Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343. In *Newcomb v. Cincinnati Ins. Co.*, 22 Ohio St. 382, where the plaintiff, not fully insured, after recovering his insurance money, sued the wrong-doer for the balance of his loss, it was said that if the insured was bound to account to the insurers for anything, it could only be for the surplus after deducting his full loss and expenses.

insurer in the name of the assured), by the exercise or requiring of which right or condition the loss against which the assured is protected can be or has been diminished.¹]

§ 457. **Subrogation.**—Some of our own earlier cases, indeed, seem to have gone further in favor of the insured than is conceded to be permissible according to the doctrine of the cases heretofore cited.² Thus, in *Ætna Insurance Company v. Tyler*,³ it was said that where the property insured is held by a vendee under a contract of sale, and a portion of the purchase-money remains unpaid at the time of the loss, and the vendor receives the amount of the loss from the underwriter, the latter will be entitled to be substituted in the place of the vendor in respect to his rights and remedies against the purchaser. And upon the doctrine of the last case the Court of Errors and Appeals of New Jersey⁴ broadly laid down the rule, that where a party holding a lien upon real estate to secure a debt effects an insurance upon such property, in case of a loss the insurance company, upon payment of the insurance, will be entitled to the benefit of the security held by the insured to the amount of the money paid; and if they pay the insured the whole amount of the claim for which he holds such security, they will have a right to the whole of the security held by him. And if the insured holds other securities for the same debt, the insurers will have a right to them also, and if after effecting the insurance the insured parts with a portion of his securities, he will forfeit the right *pro tanto* to recover of the insurers. But these cases seem hardly consistent⁵ with *Benjamin v. Saratoga County Mutual Insurance Company*,⁶ where a vendor, under a contract of sale, agreed with the vendee to sell him the property,

¹ [Castellain v. Preston, 8 Q. B. D. 613; 11 Q. B. D. 380.]

² *Ante*, § 456.

³ 16 Wend. (N. Y.) 385.

⁴ *Sussex County Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541. See also to the same point, *Dick v. Franklin Ins. Co.*, St. Louis Ct. of App., 10 Ins. L. J. 468; *Honore v. Lamar Ins. Co.*, 51 Ill. 409.

⁵ [The cases seem consistent to me on the principles set out in the analysis at the head of this chapter.]

⁶ 17 N. Y. 415. See also *Clinton v. Hope Ins. Co.*, 45 N. Y. 454.

the vendee to pay him the premiums he might pay under an insurance which he already had for continuing the same, of which facts the insurers had notice and to which they gave their consent, and it was held that, upon payment of the loss to the vendor, the insurers were not entitled to be subrogated to his rights against the vendee; and *Kernochan v. New York Bowery Fire Insurance Company*,¹ where a policy was taken out in the name of the mortgagee, under an agreement between him and the mortgagor that the mortgagee should pay the premiums, the insurers knowing nothing of the agreement, and the insurers were held not entitled to subrogation.² [Where a vendor has made a complete sale, and taken a mortgage for a part of the purchase-money, a company on offering the amount of her mortgage may be subrogated to her rights under it. But if the sale is not yet complete at the time of loss, the vendor is still the owner, the loss is hers, and the company is liable on its contract of absolute indemnity, and cannot demand an assignment of the mortgage.³ Except as varied by express agreements among the parties⁴ the insurer has no rights against a wrong-doer other than those of the assured, and it can enforce those only in his name and after admitting the claim on the policy.⁵ The insurer can recover what he has paid and no more.⁶]

[§ 457 A. **Subrogation; Carrier.** — An insurer of goods lost while in course of transportation by a carrier is entitled after payment of the loss to recover what he has paid from the carrier⁷ except where the shipper has agreed that the carrier shall have the benefit of insurance on the goods. In Louisiana, however, it has been held that when cotton was lost while on

¹ 17 N. Y. 428. See also *Royal Ins. Co. v. Stinson*, Sup. Ct. (U. S.), 11 Repr. 689; *Bradford v. Greenwich Ins. Co.*, 8 Abb. (N. Y.) 261.

² See also *Excelsior Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343.

³ [*Nelson v. Bound Brook Mut. Fire Ins. Co.*, 43 N. J. Eq. 256, 259, reversing *Bound Brook Mut. Fire Ins. Ass. v. Nelson*, 41 N. J. Eq. 485.]

⁴ [§§ 457 A., 457 B.]

⁵ [*Midland Ins. Co. v. Smith*, 6 Q. B. D. 561; *Alliance Mar. Ins. Co. v. Louis. State Ins. Co.*, 8 La. 1; *Phoenix Ins. Co. v. Erie, &c. Trans. Co.*, 117 U. S. 312, and 118 U. S. 210, and cases cited.]

⁶ [*Holbrook v. United States*, 21 Ct. Cl. 434 (1886).]

⁷ [*Phoenix Ins. Co. v. E. & W. Trans. Co.*, 10 Biss. 18 at 29.]

board A.'s train, and the insurance company paid the assured the loss, it was held that it could not sue in the name of the insured and recover of the common carriers, although they would have been liable to the insured, the ground of the decision being that there was no privity of contract between the insurers and the railroad company.¹ The dissent of JJ. Taliaferro and Wyly is, however, a complete refutation of the majority opinion, showing that the railroad company ought to stand the loss, and it made no difference whether it paid the insured or the insurer, who had reimbursed the insured. The carrier's liability is the ultimate liability, for it arises from failure of duty. If the insured wishes to place the ultimate liability on the insurer, he must make his contract in that way and pay his additional premium; then he will be in a condition to stipulate that the carrier shall have the benefit of insurance and get lower freight-rates in consequence. If a policy says, "this insurance shall not inure to the benefit of any carrier," the carrier cannot avail himself of it; and if this clause is violated by an agreement between the carrier and the assured that the former shall be subrogated to the insurance, neither of them can sue the insurer, the policy is void, and this although the carrier did not know of the provision.² An insurer suing the common carrier by right of subrogation may recover the full value of the goods without regard to the amount of the policy³ and six per cent interest from the time they would probably have been delivered in the ordinary course of affairs.⁴ A defence which might have been set up by the company against the insured, but was waived by it, and which would not be good in a suit by the owner against the carrier, is no bar to an action by the company against the carrier, by subrogation.⁵ An insurer on paying the loss becomes the real

¹ [Carroll v. New Orleans, &c. R. R., 26 La. Ann. 447.]

² [Insurance Co. v. Easton, 73 Tex. 167; Carstairs v. Mechanics', &c. Ins. Co., 18 Fed. Rep. 473, 4th Cir. (Md.) 1883.]

³ [Mobile, &c. R. R. v. Jurey, 111 U. S. 584 (1884).]

⁴ [Insurance Co. of New York v. St. Louis, &c. Ry. Co., 9 Fed. Rep. 811, 8th Cir. (Mo.), 11 Ins. L. J. 182, 1882.]

⁵ [Sun Mut. Ins. Co. v. Miss. Val. Trans. Co., 17 Fed. Rep. 919, 8th Cir., 1883.]

party in interest, and to the extent of his disbursement subrogated to the right of the insured against a carrier, without any formal assignment or express stipulation, and when the circumstances give jurisdiction to the admiralty courts may bring suit in his own name.^{1]}

[§ 457 B. *Subrogation ; Carrier (continued)*. A common carrier may by agreement with the owners secure to himself the benefit of any insurance effected by the owner on the goods, and in the absence of fraud, such an agreement defeats the right of subrogation the insurance company would otherwise have.² If there is a stipulation in the bill of lading that the carrier, if incurring liability, shall have the benefit of the insurance on the goods, the insurer has no right of suit by subrogation.³ The right that an insurer has, on paying the loss, to pursue third persons is only the right that the insured has, and if the latter contracts with a carrier that he, the carrier, shall have the benefit of any insurance on the goods in case the carrier incurs liability by the loss or damage of the goods, in the absence of fraud or express stipulation for subrogation in the policy this contract with the carrier is good, and limits the right of the insurer by way of subrogation.⁴ “As the carrier might lawfully himself obtain insurance against loss of the goods by the usual perils, though occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the latter. This stipulation does not, in terms or effect, prevent the owner from being reimbursed the full value of the goods; but being valid as between the owner and the carrier, it does prevent either the owner himself, or the insurer, who can only sue in his right, from maintaining an action against the carrier upon any terms inconsistent with this stipulation.”⁵ An

¹ [Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U. S. 397; The Sidney, 27 Fed. Rep. 119 (N. Y.), 1886, reversing, 23 id. 38.]

² [Mercantile Mut. Ins. Co. v. Calebs, 20 N. Y. 173 at 178; Rentoul v. N. Y. Central, &c. R. R., 20 Fed. Rep. 313; 2d Cir. (N. Y.), 1884.]

³ [Platt v. Richmond, &c. R. Co., 108 N. Y. 358; British, &c. M. Ins. Co. v. The Gulf, &c. R. Co., 63 Tex. 475.]

⁴ [Phoenix Ins. Co. v. Erie, &c. Trans. Co., 117 U. S. 312, 325-326. See also Jackson Co. v. Boylston Ins. Co., 139 Mass. 508, 510, 511.]

⁵ [J. Gray, 17 U. S. 325.]

agreement in a contract of carriage that the carrier, if he incurs liability by loss or damage to the goods, shall have the benefit of any insurance on them, is not within a clause against selling, transferring, or pledging the interest of the insured in the policy.¹ But in the absence of express agreement the carrier has no claim on the insurance, and in a suit by the owner of goods against a railway for their loss by its negligence, it is no defence that the owner has received their value from an insurance company.² When a consignor receipts a bill of lading to a common carrier which stipulates against the latter's liability for loss by fire, the former cannot show that he did not read the bill, and the latter is not liable unless the fire was caused by his negligence.³ A by-law requiring the insured to release the railroad before applying to the railroad relief association for damages is valid, as it simply puts the assured to his election.⁴ Underwriters who sell abandoned property are not entitled to any commissions on the sales, in a suit against the carrier.⁵

[§ 457 C. **Mortgagor and Mortgagee.** — If an insurance company pay a mortgagee the loss, it is subrogated to the rights of the mortgagee, and may proceed against the mortgagor on the mortgage. The right does not rest on contract but on principles of justice. If the mortgagee has made a settlement that prevents this subrogation he cannot recover from the insurance company, but he may bind *himself* not to proceed against the mortgagor, reserving the right to sue the insurance company, and in such case his receipt and covenant would not prevent the company from proceeding against the mortgagor.⁶ But where a mortgagor takes out a policy and pays the premiums making the insurance payable to the mort-

¹ [Jackson Co. v. Boylston Ins. Co., 139 Mass. 508.]

² [Tex. & Pac. R. Co. v. Levi, 59 Tex. 674, following Webber v. Morris, &c. R. Co., 35 N. J. 413; Clark v. Wilson, 103 Mass. 221, &c.]

³ [Grace v. Adams, 100 Mass. 505 at 507.]

⁴ [Owens v. Balt. & Ohio R. Co., 35 Fed. Rep. 715; State v. Same, 36 Fed. Rep. 655 (Md.), 1888.]

⁵ [Sun Mut. Ins. Co. v. Miss. Val. Trans. Co., 16 Fed. Rep. 800, East Dist. of Missouri, 1883.]

⁶ [Thomas v. Montauk Fire Ins. Co., 43 Hun, 218.]

gagees, the company cannot claim to be subrogated to the first mortgagee on paying the amount of his mortgage. The insurance is for the benefit of the mortgagor, and the money paid to the mortgagee goes in satisfaction of his debt. Only where the mortgagee himself insures his interest, or other peculiar circumstances exist making the company a surety, will subrogation to the mortgage be decreed.¹ An agreement in the policy that the insurance as to the interest of a mortgagee shall not be avoided by any act of the mortgagor, but that in case a loss occurs after action of the mortgagor which causes forfeiture as to himself, the company shall on paying the loss to the mortgagee be subrogated to his rights under the mortgage, to the extent of such payment, and may pay the whole debt and require an assignment of the mortgage, is valid and will be sustained by the courts.² If the parties by their action destroy the right of the company to the subrogation named, the company is at the same time released from liability under the mortgagee clause.³ The election of the company to pay the mortgage debt and have the mortgage assigned must be exercised within a reasonable time, and a tender seven months after suit was begun, by the mortgagee on the policy, is not within a reasonable time.⁴

§ 458. **Loss; Right of Insurers to intervene by Contract; Mortgagor and Mortgagee.** — Under such a provision as that named in the last section, if the mortgagee enters into any contract which by its terms would be inconsistent with his right of assignment of the mortgage debt, such contract would constitute a valid bar to his recovery. But a contract whereby the mortgagee in possession lets a third party into that possession, and agrees, for a consideration to be paid at a future time, that he will upon such payment assign the mortgage, the contract being still unexecuted, is not such a contract.⁵ *The Springfield Fire and Marine Insurance Company v. Allen*⁶

¹ [Pearman v. Gould, 42 N. J. Eq. 41.]

² [Allen v. Watertown Ins. Co., 132 Mass. 482.]

³ [Lett v. Guardian Fire Ins. Co., 52 Hun, 570.]

⁴ [Eliot Five Cents' Savings Bank v. Commercial Ass. Co., 142 Mass. 142.]

⁵ Davis v. Quincy Mut. Fire Ins. Co., 10 Allen (Mass.), 113.

⁶ 43 N. Y. 389.

presented a case where a policy was issued to the owner of mortgaged premises in which the loss was made payable to the mortgagee, and which provided also that in case of any change of title the policy should be void (except as to the interest of the mortgagee), and further that in case of payment of loss to the mortgagee, for which the insurers would not have been liable to the mortgagor, the insurers should be subrogated to the rights of the mortgagee; and it was held, on a bill to foreclose, that the property having been sold contrary to the conditions of the policy, and the insurers having paid the mortgagee his loss and taken an assignment of his mortgage, the mortgagor could not require the amount paid the mortgagee by the insurer to be appropriated towards the liquidation of the mortgage. And though the mortgage authorizes the mortgagee to insure at the expense of the mortgagor, the mortgagee may nevertheless directly insure his own interest, and may agree to assign to the insurer an interest in the mortgage equal to the amount of loss paid, in which case the insurer will be subrogated to that amount.¹

§ 459. **Loss ; Negligence ; Proximate Cause.** — Much discussion has been had on the subject of the liability of railroads for negligence, largely turning upon the distinction between remote and proximate causes. In *Ryan v. New York Central Railroad*,² where fire was first communicated by sparks from the engine to a wood-shed of the company, and thence by sparks from the shed to the property of the plaintiff, it was held that the cause was remote, and the plaintiff could not recover. And this case seems to have been followed in Pennsylvania³ and in Illinois.⁴ But in Massachusetts,⁵ it was held that such a circumstance did not affect the question of immediateness or remoteness; and in *Perley v. Eastern Railroad Company*,⁶ referring to the case in New York, the court say : —

¹ *Foster v. Van Reed*, 70 N. Y. 19.

² 35 N. Y. 210.

³ *Penn. R. R. Co. v. Kerr*, 62 Pa. 353, 363.

⁴ *Flint v. Railway Co.*, 59 Ill. 349.

⁵ *Hart v. Western R. R. Co.*, 13 Met. (Mass.) 99.

⁶ 98 Mass. 418.

“The defendant’s counsel have referred us to the case of *Ryan v. New York Central Railroad Company*. We understand the liability in that State is by the common law, and not under the provisions of any statute. In that case, a distinction is made between proximate and remote damages. The fire was communicated from the defendants’ locomotive to their wood-shed, and thence by sparks, one hundred and thirty feet, to the plaintiff’s house; and it was held that the plaintiff could not recover, because the injury was a remote and not a proximate consequence of the carelessness of the defendants in permitting their fire to escape. Our own cases, above referred to, are not noticed in the opinion. Nor does the opinion draw any line of distinction between what is proximate and what is remote; and such a line is not obvious in that case. If, when the cinder escapes through the air, the effect which it produces upon the first combustible substance against which it strikes is proximate, the effect must continue to be proximate as to everything which the fire consumes in its direct course. This is so, whether we regard the fire as a combination of the burning substance with the oxygen of the air, or look merely at its visible action and effect. As matter of fact, the injury to the plaintiff was as immediate and direct as an injury would have been which was caused by a bullet, fired from the train, passing over the intermediate lots, and wounding the plaintiff as he stood upon his own lot. It is as much so as pain and disability are proximate effects of an injury, though they occur at intervals through successive years after the injury was received. Yet these are called proximate effects, though the actual effects of the injury may be greatly modified in every case by bodily constitution, habits of life, and accidental circumstances.¹

“The instructions given in respect of the back fires, which were kindled with a view to check the fire which had proceeded from the locomotive, were correct; for they required the jury to find, in substance, that these fires did not in fact contribute to the loss of the plaintiff, but that they were

¹ See also *ante*, § 302; *post*, § 518, note.

swallowed up by the advancing flame, which went on and destroyed the plaintiff's property." ¹

[A railroad company having notice that a hose was laid across its track as the only available way of fighting a fire, which nevertheless ran a train over the same, thus rendering it impossible to save the buildings on fire, is liable for the loss,² the severing of the hose being the proximate cause of the destruction of the building. One who negligently sets a fire on his own land and keeps it negligently is liable for loss done by its spreading directly to the land or property of another, in whatever way and whether or not he might reasonably have anticipated the particular manner in which it spread.³ When a city tears down a building under lawful authority during a fire it is liable to the owner for damages, unless the building would have been inevitably destroyed by the flames, when nothing can be recovered.⁴]

¹ By the statute of Massachusetts, the railway company is liable for fires caused by fire communicated by the engine, without reference to the question of negligence on their part. By the common law the liability is based upon negligence; but it is not easy to see how the distinction at all enters into the question whether a cause is proximate or remote. The opinions must be regarded as directly opposed to each other. *Ryan v. N. Y. Central R. R. Co.* has been said to be inconsistent with the prior case of *Field v. N. Y. Central R. R. Co.*, 82 N. Y. 339, in *Webb v. Rome, &c. R. R. Co.*, 3 *Lansing* (N. Y.), 453. This, however, was not admitted by the Court of Appeals; nevertheless, they affirmed the judgment in *Webb v. Rome, &c. R. R. Co.*, 49 N. Y. 421, although that was founded upon the case of *Field v. N. Y. Central R. R. Co.*, assuming that case to be totally inconsistent with *Ryan v. N. Y. Central R. R. Co.*

² [*Metallic, &c. Co. v. Fitchburg R. R. Co.*, 109 Mass. 277 at 283.]

³ [*Higgins v. Dewey*, 107 Mass. 494 at 496.]

⁴ [*Mayor v. Lord*, 17 Wend. 285 at 296 (decision on 2 R. Laws, 368.)]

CHAPTER XXIV.

CREDITORS.

ANALYSIS.

- § 459 A. Extent of a creditor's claim on the proceeds of insurance made to secure the debt.
- § 459 B. Creditors *v.* beneficiaries.
- § 459 C. Statutes.
- § 459 D. Creditor may recover though the debt is paid.
 Creditor to whom policy payable as his interest may appear has no right of action on the policy.
 Creditor not a "dependant."
 Homestead exempt, and so are proceeds.
 Proceeds of other exempt property not so.
 Ordinary life policy vests in heirs, not subject to debts. Endowment policy otherwise.
- § 459 E. Insolvency.
- § 459 F. Garnishment.
- § 459 G. Proofs if not waived must be furnished by insured or by creditor, before the latter can trustee the company.
- § 459. When creditor cannot garnishee.

[§ 459 A. **A Creditor's Claim upon the Proceeds of Insurance Intended to Secure the Debt** should go no further than indemnity, and all beyond the debt, premiums, and expenses should go to the debtor and his representative, or remain with the company, according as the insurance is upon life or on property. The authorities, however, are agreed. Some refuse to give the debtor or his representatives the excess unless the insurance was at his motion, request, or expense.

Where the relation of debtor and creditor exists, and it is apparent that the instrument in question was effected by the creditor as a security or indemnity for the debt, and if the debtor directly or indirectly provides money to defray the expense of that security, he is entitled to the policy when the debt is paid, and this applies to a life annuity.¹ On the debt-

¹ [Courtenay *v.* Wright, 2 Giff. 337.]

or's death, his representatives may claim the proceeds of the policy after payment of the debt and the premiums.¹ When a policy of insurance is effected by a creditor to secure payment of a debt, it does not belong absolutely to the creditor, nor is he entitled to it and also to the payment of the debt.² Where a husband and wife assign to the husband's creditors (his brothers) a contingent interest of the wife's, and the creditors insure the wife's life, and she dies before contingent interest falls in, the creditors receiving the insurance money, upon the husband's becoming a bankrupt later, the brothers may only prove the amount due them less the insurance received *minus* expenses. They were trustees, and cannot take to themselves benefits due to the *cestui que trust*.³ A judgment creditor of a corporation insured its real estate in his and the corporation's names, and afterwards bid the same in at a sale under his judgment. Later, fire partially destroyed it, and he was held able to recover and hold the insurance money. If, however, the corporation had redeemed before the loss, or the loss had happened before the sale, the insurance money would have belonged to the corporation.⁴ Where, however, a creditor insured the life of his debtor for \$6500, the debt being about \$1000, and the creditor collected \$2124.82 on the policies, which after deducting debt, interest, premiums, and expenses, left a balance of \$474.53, it was held that the creditor was entitled to this balance.⁵ And in *Amick v. Butler*,⁶ it was held that a policy for \$2000 taken out by F. on his own life, naming A. as beneficiary, a creditor of F.'s for \$600, A. paying the expenses and premiums, was a good contract, and that F.'s representatives could not recover from A. the \$1250 excess over the debt and premiums received by him on the death of F. The lower court gave judgment for the administrator, but the Supreme Court reversed

¹ [*Moreland v. Isaac*, 20 Beav. 389; *Holland v. Smith*, 6 Esp. 11. In both these cases the creditor had charged up the premiums to the debtor.]

² [*Lea v. Hinton*, 5 De G. M. & G. 823.]

³ [*Ex parte Andrews*, 1 Madd. 573.]

⁴ [*Mickles v. Rochester City Bank*, 11 Paige Ch. 118 at 128.]

⁵ [*Rittler v. Smith*, 70 Md. 261.]

⁶ [111 Ind. 578.]

the decision upon reasoning not altogether satisfactory. Where the "life" is the real contracting party and pays the premiums, any one may be named as beneficiary. But where the "life" is only nominally the contractor, the real party being the beneficiary, the case in substance does not differ from a policy direct to the beneficiary, and if a policy of \$1000 taken out by A. on the life of F. without any interest in the life of F. is objectionable, then why is not a policy taken by A. for \$2000 on the life of one who owes him only \$600 just exactly as objectionable, if A. is allowed to keep a profit? The court felt sure that in this case there was no intent to speculate. We think the law should go further and prevent the *fact* of speculative profit. Motives are hard to prove, and if such contracts are to be sustained wagers become an easy thing. A debt is easily created and a policy obtained in the name of the debtor.

In the case under discussion the policy was to be turned over to the debtor on payment of the debt and premiums. So far as this is of effect, it goes to show that in substance the agreement was one of security merely, and that the creditor was entitled to no more than indemnity for what he lost by the death of F. That is the result pointed to whether we look at the nature of insurance, or to the broader ground of perfect justice.]

[§ 459 B. **Beneficiary v. Creditors.** — In Alabama a husband may insure his life in favor of his wife, and to the extent of \$500 annual premiums it will be good against creditors. But if the wife die before the husband his creditors take precedence of her "heirs and representatives," to whom the policy is made payable.¹ Policies taken out by a husband for the benefit of his wife and children are not subject to the claims of creditors of the wife.² The wife takes free of husband's creditors, though the insured gave the policy to her by his will.³ It is not fraudulent as against creditors for a husband to pay reasonable premiums to insure his life for his

¹ [Tompkins v. Levy, 87 Ala. 263.]

² [Leonard v. Clinton, 26 Hun, 288, 291].

³ [Pinneo v. Gbodspeed, 120 Ill. 536.]

wife.¹ Even though he is really insolvent, in order to recover the premiums so paid it must be shown that there was a fraudulent intent in which the company participated.² But after the money has been paid to the wife and deposited by her in bank in her own name, it may be reached by her creditors.³ If A. insures his life for the benefit of B., but with a private understanding that the avails shall be used not alone for B. but for A. as well, if he had any outstanding accounts, and if A. just prior to his death directs B. to pay a certain debt from said avails, B. is under legal obligation to do so.⁴ In Pennsylvania, where a person takes out a policy on his own life in the name and for the benefit of his family or dependent relatives, their title is not subject to his debts, and even the question of fraud cannot be raised, but if he takes out a policy in his own name, and then assigns it to his wife or other dependent relative, his creditors may raise the question of fraud.⁵

[§ 459 C. *Creditors and Beneficiaries; Statutes.*⁶ — The rights of creditors as against beneficiaries are largely determined by the statutes of the several States. In New York a policy on a husband's life in favor of the wife is not assignable except in cases authorized by statute. The court cannot compel an assignment, nor can the avails thereof be appropriated in advance by operation of law, or subjected to the liens of creditors of herself or husband.⁷ Premiums in excess of \$500 paid by the husband inure to the benefit of creditors, and a receiver may institute proceedings to ascertain the amount of such excess, secure a lien on the policy, and restrain the beneficiaries from assigning the policy.⁸ Under the code of Alabama a policy on the husband's life for the benefit of wife and children is not subject to the claims of creditors.

¹ [Brick v. Campbell, 54 N. Y. Super. 305.]

² [Central Bank of Washington v. Hume, 128 U. S. 195.]

³ [Crosby v. Stephan, 32 Hun, 478.]

⁴ [Hutchings v. Miner, 46 N. Y. 456.]

⁵ [McCutcheon's Appl., 99 Pa. St. 133.]

⁶ [See §§ 391-392.]

⁷ [Baron v. Brummer, 100 N. Y. 372.]

⁸ [Masten v. Amerman, 20 Abb. N. C. 443.]

The solvency or insolvency of the husband when the premiums are paid does not affect the policy, but the policy would be subject to debts existing before the law was passed,¹ and if the annual premiums exceed \$500 on a policy taken out by a husband in favor of his wife, the excess may be taken by creditors,² and they may reach the premiums paid on or the proceeds of a life policy obtained by the debtor for *one* of his children, unless the policy was intended to secure a debt due the child. Such a policy is not within the protection of the code § 2733, which was designed for the benefit of *wife* and *children*, while this policy was for *one* child only.³ Under the Florida statute if the premiums are reasonable, and no intent to divert funds from creditors or other fraudulent purpose is shown, the proceeds of the insurance must go to the beneficiary free of the debts of the insured.⁴ In the District of Columbia the claims of creditors upon a policy on the life of an insolvent debtor in favor of his wife and children, extend to the premiums paid since insolvency, but no further.⁵

[§ 459 D. A creditor may recover though the debt has ceased between the issue of the policy and the death of the debtor.⁶ A creditor to whom a policy is payable "as his interest may appear" has no right of action on the instrument.⁷ A creditor of a member of a beneficiary association is not a "dependant," and a promise by the association to pay him a sum due at the member's death is void.⁸ A policy on a homestead is exempt the same as the proceeds of a sale of the homestead; the policy is not even subject to a lien on the homestead itself.⁹ Even one who held a mechanic's lien on the building cannot garnishee.¹⁰ In general, however, if prop-

¹ [Fearn v. Ward, 65 Ala. 33.]

² [Felrath v. Schonfield, 76 Ala. 199, under a statute like that of New York.]

³ [Fearn v. Ward, 80 Ala. 555, 559.]

⁴ [Eppinger v. Canepa, 20 Fla. 262.]

⁵ [Central National Bank v. Hume, 3 Mackey, 360.]

⁶ [Rittler v. Smith, 70 Md. 261.]

⁷ [Hatch v. Metropole Ins. Co., 13 Rep'r. 293, 8th Cir. (Col.) 1882.]

⁸ [Skillings v. Mass. Ben. Ass., 146 Mass. 217.]

⁹ [Porter v. Porter, 2 Tex. Civ. Cas. 434; Cameron v. Fay, 55 Tex. 58.]

¹⁰ [Cameron v. Fay, 55 Tex. 58.]

erty exempt from execution is destroyed, the insurance money does not partake of the exemption.¹ The amount of insurance due on a mutual contract is not chargeable with the payment of the debts of the deceased.² An ordinary life policy is not part of the estate of the deceased, for the payment of debts, but vests absolutely in his heirs. An endowment policy, however, is a part of his estate, and subject to his debts.^{3]}

[§ 459 E. *Insolvency*. — But a policy taken out by A. for the benefit of himself and his representatives becomes a part of his estate and subject to all the rules of law applicable thereto, and an assignment of such a policy by A. to his daughters, he being then insolvent, will not prevent the creditors from following the fund in equity, though an executor is estopped by the act of his intestate to deny the title of his assignee.⁴ The rights of creditors become fixed by a decree of insolvency. And where a decree of dissolution was made, and a receiver appointed, who notified A. to forward his policy for cancellation, a loss by fire subsequent to this notice gave A. no right to any more than the ratable proportion of his unearned premium under the cancellation.⁵ A composition with creditors rests on the principle that each creditor acts on the belief that the others accept and receive the same proportion he takes, and no more, and any agreement favoring one that is not consented to by the others is void.^{6]}

[§ 459 F. *Garnishment*. — A *policy* is a mere *chose in action*, and not subject to attachment or garnishment.⁷ But after a loss the insurance company may be garnished, where the payment of the loss is not conditional on anything remain-

¹ [Mouniea v. German Ins. Co., 12 Brad. 240.]

² [Mellows v. Mellows, 61 N. H. 137; Smith v. Bullard, id. 381.]

³ [White v. Smith, 2 Tex. Civ. Cas. 400, 401.]

⁴ [Burton v. Farinholt, 86 N. C. 260.]

⁵ [Dean & Son's Appl., 98 Pa. St. 101.]

⁶ [Pfleger v. Browne, 28 Beav. 391.]

⁷ [Grace v. Koch, 1 Tex. Civ. Cas. § 1065; Price v. Brady, 21 Tex. 614; Taylor v. Gillean, 23 Tex. 508; Ellison v. Tuttle, 26 Tex. 283; Handy v. Dobbin, 12 Johns. 220; Drake on Attachment, 481.]

ing to be done.¹ If a creditor garnisheeing an insurance company shows the policy and that proofs of loss were furnished or waived, it is *prima facie* evidence of liability.² When a policy is written "for whom it concerns," the proceeds in the insurer's hands are subject to the trustee process by a creditor of one part-owner, to the extent of his share, although he be not mentioned in the policy.³ *A.* died, leaving insured personal property. *B.*, a creditor, recovered a judgment against the executors, and levied on the property in their hands, which was afterwards destroyed under the policy, and it was held that *B.* had a right to priority of payment out of the proceeds thereof, over subsequently recovered judgments of other creditors.⁴ An assignment to a creditor of a policy on goods before loss, without notice to the underwriters, vests an equitable right in the assignee, which holds against a trustee attachment after loss by another creditor of the assignor. The creditor thus attaching can stand in no better position than the assignor.⁵ The dissolution of a company does not abate a prior attachment of a creditor on the debt of a mutual member to the company.⁶ If the company adjust a loss with an assignee, a creditor of the assignor cannot take advantage of the fact that the assignment was without consent of the company. Only the insurer can set up that fact.⁷ But where *A.* assigns a policy to *B.* as collateral, and after loss *B.* receives on the policy an amount in excess of the debt secured, the creditors of *A.* may garnishee the excess in *B.*'s hands.⁸ Where *A.* insures, payable to *B.*, a mortgagee, as his interest may appear in the goods, *C.*, a creditor of *A.*, may garnish, and if *B.* comes into the proceedings as a claimant, *C.* may attack his mortgage as fraudulent.⁹ If, however, the mortgage is valid on its face

¹ [Hanover Fire Ins. Co. v. Connor, 20 Brad. 297.]

² [Crescent Ins. Co. v. Moore, 63 Miss. 419; Lovejoy v. Hartford Fire Ins. Co., 11 Fed. Rep. 63, 65 (Ill.), 1882.]

³ [City Bank v. Adams, 45 Me. 455.]

⁴ [Mapes v. Coffin, 5 Paige Ch. 296 at 298.]

⁵ [Wakefield v. Martin, 3 Mass. 558 at 559.]

⁶ [Hays v. Lycoming Fire Ins. Co., 99 Pa. St. 621.]

⁷ [Insurance Co. v. Trask, 8 Phila. (Pa.) 32 at 34.]

⁸ [Warder v. Baker, 67 Wis. 409.]

⁹ [North Star Boot & Shoe Co. v. Ladd, 32 Minn. 381.]

and given in good faith, though never filed for record, it will be sufficient against the creditor.^{1]}

[§ 459 G. **Insured or Creditor must furnish Proofs or they must be Waived.**—A trustee process in favor of a creditor will not lie until the proofs of loss as required by the statute have been furnished or waived.² When after a loss by fire covered by a policy the insured had not made the required preliminary proof to the company, and when at that time the company was summoned as trustee for the insured it was discharged, although after the service of the trustee writ and within the necessary time to recover the insurance, the preliminary proof was made. The claim was contingent until the proofs were furnished, as the policy declared that the company should have sixty days after proofs in conformity with the conditions of the policy in which to pay.³ But when the assured neglects to make preliminary proofs, his claim may, nevertheless, be attached and the proofs made by the creditor.⁴ The assured was out of the State. In Texas it is held that although a policy provides that suit shall not be begun until proof of loss, yet a creditor may garnishee the company before such proof.^{5]}

[§ 459 H. **When the Creditor cannot Garnishee.**—A life policy payable to the legal representatives of the assured is not subject to attachment by his creditors during his life, and on his death the funds vest in the representatives for the benefit of all who are interested in the decedent's estate.⁶ A creditor of the insured cannot take by garnishment funds payable by the policy to a mortgagee of the insured.⁷ If a trustee holding land in trust for A. for life with a reversion to himself, insures the same in his own name, it will be held to be trust money and not attachable by private creditors, unless it be shown to be for more than the life

¹ [Coykendall v. Ladd, 32 Minn. 529.]

² [Nickerson v. Nickerson, 80 Me. 100.]

³ [Davis v. Niagara, 49 Me. 282, 284.]

⁴ [Northwestern Ins. Co. v. Atkins, 3 Bush (Ky.), 328 at 333.]

⁵ [Insurance Co. v. Willis, 70 Tex. 12.]

⁶ [Day v. N. E. L. Ins. Co., 111 Pa. St. 507.]

⁷ [Mansfield v. Stevens, 31 Minn. 40.]

interest.¹ Where a policy is payable to the representatives of the insured for the sole use of his children, the administrator is the only one who can collect from the company, and it will not be liable to trustee process brought by a creditor of one of the children.² When an action is pending in one State against an insurance company it cannot be summoned in this State as trustee for the plaintiff in that suit.³]

¹ [Lerow v. Wilmarth, 9 Allen, 382 at 384.]

² [Stowe v. Phinney, 78 Me. 244.]

³ [American Bk. v. Rollins, 99 Mass. 313 at 315.]

CHAPTER XXV.

OF THE NOTICE. PRELIMINARY PROOF, PARTICULAR ACCOUNT.

ANALYSIS.

- § 460. Notice and proofs necessary. Proofs may be notice, but notice cannot dispense with proofs. A second proof is to be taken *with* the first. Assured not bound to apportion loss in his proofs.
- § 461. Time, place, and mode of notice. Mail. Mere silence no waiver of time limit.
- § 462. "Forthwith," "soon as possible," "immediately," mean within a reasonable time under all the circumstances.
- § 463. By whom and to whom notice is to be given.
- § 464. Waiver of notice (see also § 461). Even defects in violation of statute may be waived, for the provision is for the company's benefit.
Receiving and acting on an oral notice waive a written one.
Silence when notice is not given in *time* is no waiver, for speaking could not aid the insured to cure the defect.
- § 465. Preliminary proofs. See also § 460.
Who may furnish and receive. Time and waiver of it. Mail. Form (see also § 466). Due notice and proof of death, § 465. Waiver of it. Presumption of death in case of absence. In what part of the seven years death is to be supposed to have taken place. Two persons perishing, which first, § 465.
Excuse. Loss of policy is not, nor instantaneous death (?); but insanity, or absence, or act of company may be, and notice of total loss may make further proof unnecessary except to show value. Liberal construction to save forfeiture, § 465. Books, invoices, and vouchers, excuses for not furnishing, § 465.
Sworn appraisalment as part of proof, § 465.
Proofs as evidence, § 465, also § 460.
Honest mistakes not fatal, § 465.
Insured may recover more than the value named in proofs, § 465.
- § 466. Certificate of magistrate, examination on oath.
- § 467. Proof of death (see also § 465). Family physician, § 466.
- §§ 468-471. Waiver of preliminary proof.
Refusal to pay on other grounds, or general denial of liability without giving reasons waives the furnishing of proofs, or defects in them if they have been furnished, § 469.

Defects are waived by omission to notify the assured of them *promptly* and *specifically*, so as to give him opportunity for correction. A mere general statement that the proofs are imperfect is not sufficient. It has been held, however, that rejecting the proofs and demanding others "in exact accordance with the conditions of the policy" is a sufficient specification, § 469 B.

Especially will any act recognizing the policy without mentioning defects be a waiver, §§ 469 B, 473.

Payment of money into court admits cause of action.

Proceeding to investigate loss, make adjustment, &c., any act leading insured to suppose proofs would be useless, waives them, §§ 469 C, 469 B, 469, even though required by statute, § 469 C.

Who may waive, § 469 D.

Provision in the policy or in by-law that no condition shall be waived except in writing or by indorsement on policy, will not prevent waiver by voice or act, §§ 473, 473 A.

Particular defects pointed out waives others, § 470.

What is not a waiver, § 471.

Mere silence not enough to waive furnishing proofs, &c., § 471.

Waiver of notice is not waiver of proofs, § 471.

§ 472. Evidence of preliminary proof.

False swearing in, see § 477.

§§ 474, 475. Particular account, § 474 (see § 465), and what is required in it, § 475.

Loss of books excuses except so far as memory or other means serve, § 476.

Waiver of it, § 475 (see also § 465). Time of rendering it, § 475.

§ 476. When suit may be brought. Personal examination, &c.

§ 477. Fraud and false swearing in preliminary proof.

Payment by mistake may be recovered.

§ 460. Notice ; Preliminary Proof ; Particular Amount. — Where a loss has occurred, it devolves upon the assured to give notice thereof, and also to furnish some proof thereof and of the amount claimed. These duties are usually required in substantially the same phraseology, and with greater or less exactness and particularity, as conditions precedent to the right to demand payment, and in order that the insurers may investigate for themselves the validity of the claim. They are also usually required within a certain specified time, though not always. The preliminary proofs are only evidence of the fact that the required proofs have been furnished, not of the facts stated in them;¹ and they are dis-

¹ *Newton v. Mut. Benefit Life Ins. Co.*, 2 Dill. C. Ct. 154; *Planters' Ins. Co. v. Comfort*, 50 Miss. 662; *post*, § 465.

inct from and supplementary to the notice, so that notice is not proof, though proof may be notice.¹ [It is error to refuse to instruct that if proper notice and proofs were not given the plaintiff cannot recover.² A second proof of loss does not nullify a prior proof returned by the company; the proofs are to be taken together as supplying each other's defects, and if combined they answer the requirements, the law is satisfied.³ The insured is not bound in his proofs to apportion the loss among the several companies, although the policy requires the proofs to state the amount claimed. Equity will apportion the loss.⁴]

§ 461. **Notice of Loss; Time and Mode.** — When the time of notice is specified, it must be given within the time required by the conditions of the contract.⁵ [A delay of fifty days without excuse is unreasonable.⁶ If a policy provides that notice shall be given within twenty-four hours after loss, but does not expressly make failure a cause of forfeiture, it will not be so held.⁷ If notice is not rendered in time, mere silence of the company does not prevent its afterwards defending on that ground.⁸] It need not be in writing, unless expressly so stipulated;⁹ nor need the insured go to the office or to the agent of the insurers for the purpose of giving the notice. If the persons authorized to receive notice on behalf of the insurers go to and inspect the premises, they thereby obtain all the information which it is the object of the notice to bring to their knowledge, and further notice will be useless and unnecessary. Thus, where the president and one of the directors of the company visit the scene of the fire for the purpose of examining into the matter, no further notice on the part of the insured will be

¹ O'Reilly v. Guardian, &c. Ins. Co., 60 N. Y. 169; [Central City Ins. Co. v. Oates, 86 Ala. 558.]

² [Sun Mut. Ins. Co. v. Holland, 2 Tex. Civ. Cas. 446.]

³ [Brown v. Hartford Fire Ins. Co., 52 Hun, 260.]

⁴ [Fuller v. Detroit Fire & Mar. Ins. Co., 36 Fed. Rep. 469 (Ill.) 1888.]

⁵ Davis v. Davis, 49 Me. 282.

⁶ [Pickel v. Phenix Ins. Co., 18 Ins. L. J. 598 (Ind.), June, 89.]

⁷ [Coventry, &c. Ins. Co. v. Evans, 102 Pa. St. 281.]

⁸ [Knickerbocker Ins. Co. v. Gould, 80 Ill. 388, 395.]

⁹ Killips v. Putnam Fire Ins. Co., 28 Wis. 472; [State Ins. Co. v. Manckeos, 38 N. J. L. 564 at 568.]

required.¹ The form is immaterial, if it includes the fact to be made known, however much it is overloaded with surplage.² Where the notice of loss and affidavit was required to state "the value of such parts as remain," and the notice stated that the building was destroyed on a certain day, and was a total loss, it appearing that the building destroyed was insured for \$1500, and was valued at \$2400, and that the brick and stone work uninsured was worth about \$100, it was held that the notice of the loss was sufficient, in the absence of any evidence that it was objected to, or a more particular statement required.³ [Sending notice of loss by mail properly addressed is *prima facie* evidence of service, and in the absence of denial the jury may find that it was received.⁴ A provision for notice to be sent "to the company at Hartford" and proofs to be furnished, &c., does not require that the *proofs* shall be sent to Hartford.⁵ When notice and proof of loss are to be given the insurer in the city of his residence or principal place of business, deposit of such notice or proof in the mail at the place of loss properly addressed is not a compliance.⁶]

§ 462. Notice; "Forthwith;" "Soon as possible," &c. — If the notice be required to be "forthwith,"⁷ or "as soon as pos-

¹ Roumage v. Mechanics' Fire Ins. Co., 1 Green (N. J.), 110; *post*, § 473.

² Rix v. Mut. Ins. Co., 20 N. H. 198.

³ Wyman v. People's Equity Ins. Co., 1 Allen (Mass.), 301.

⁴ [Susquehanna Mut. Fire Ins. Co. v. Tunkhannock Toy Co., 97 Pa. St. 424.]

⁵ [Scheiderer v. Travelers' Ins. Co., 58 Wis. 13, 17.]

⁶ [Central City Ins. Co. v. Oates, 86 Ala. 558.]

⁷ ["Forthwith" means "within a reasonable time. Central City Ins. Co. v. Oates, 86 Ala. 558. Central City Ins. Co. v. Oates, 18 Ins. L. J. 761 (Ala.), May 2, 1889; Erwin v. Springfield Fire & Mar. Ins. Co., 24 Mo. App. 145. A statement sent in two days after the loss is sent forthwith. Beatty v. Lycoming Co. Mut. Ins. Co., 66 Pa. St. 9. Notice to the local agent in a few days after loss, and by him sent at once to the company, satisfies the requirement of notice "forthwith." Argall v. Insurance Co., 84 N. C. 355. Nine months' delay is unreasonable. Scammon v. Germania Ins. Co. 101 Ill. 621. Where notice was given twenty-two days after the fire, it was held to be question for the jury if it was within a reasonable time. Donahue v. Windsor Co. M. Fire Ins. Co., 56 Vt. 374. If there is a delay of forty-eight days without excuse, the plaintiff should be non-suited. Brown v. London Ass. Corp., 40 Hun, 101. A condition to give notice *forthwith* to the *secretary* of the company, is not fulfilled by notice to the *agent*, who delayed sending it to the company, so that it was eighteen days before the company was notified. Sparrow v. Universal Fire Ins. Co., 17 Phil. 329.]

sible,"¹ or "immediately,"² it will meet the requirement, if given with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, of which the jury are ordinarily to be the judges. To give the word a literal interpretation would in most cases strip the insured of all hope of indemnity, and policies of insurance would become practically engines of fraud.³ Thus notice within eight days after the fire and within five days after it came to the knowledge of the insured, has been held to be reasonable.⁴ So, where the fire happened on the tenth, and notice of loss, dated the eleventh, reached the insurers on the fifteenth of the same month.⁵ But a delay of four months in one case,⁶ of thirty-eight days in another,⁷ of twenty days in another,⁸ and of

¹ ["As soon as possible" means within a reasonable time. What is a reasonable time is a question for the court if the facts are ascertained, otherwise for the jury under instructions. *Amer. Fire Ins. Co. v. Hazen*, 110 Pa. St. 530. Thirty days' delay will not prevent the submission of the question to the jury. *Ben Franklin Ins. Co. v. Flynn*, 98 Pa. St. 628. Where there was a delay of three months on account of a criminal suit brought against the insured on the charge of having set fire to his house, the jury found that the proofs were sent as soon as possible. *Home Ins. Co. v. Davis*, 98 Pa. St. 280. There was also a waiver in the case by receipt of proofs without objection. Eight months' delay with no excuse except "inconvenience" is not "as soon as possible." *Cameron v. Can. Fire and Mar. Ins. Co.*, 6 Ont. R. 392.]

² [A condition requiring immediate notice merely imposes the duty of reasonable diligence, under the circumstances. *Insurance Co. v. Brim*, 111 Ind. 281, 3770 R. S. 1881; *People's Acc. Ass. v. Smith*, 126 Pa. St. 317; *Rokes v. Amazon Ins. Co.*, 51 Md. 512 at 519. Notice in four days has been held "immediate." *Hoffecker v. N. C. C. M. Ins. Co.*, 5 Hous. (Del.) 101. The policy required "immediate proof and notice" of loss. The fire occurred October 8, or October 9, and an inventory of loss sent to the company November 13, was held sufficient, in view of the great derangement of business caused by the great fire in Chicago. *Same v. Mc Ginnis*, 87 Ill. 70 at 71; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388, 391, quoting *May*.]

³ *Kingsley v. New England Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 393; *Peoria Ins. Co. v. Lewis*, 18 Ill. 553; *Edwards v. Baltimore Ins. Co.*, 3 Gill (Md.), 176; *Prov. Life Ins. Co. v. Baum*, 29 Ind. 236; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *Phillips v. Prot. Ins. Co.*, 14 Mo. 220.

⁴ *New York Central Ins. Co. v. Nat. Prot. Ins. Co.*, 20 Barb. (N. Y. Sup. Ct.) 468.

⁵ *Schenck v. Mercer County Mut. Ins. Co.*, 4 Zab. (N. J.) 447; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289.

⁶ *McEvers v. Lawrence*, 1 Hoff. Ch. (N. Y.) 171.

⁷ *Inman v. Western Fire Ins. Co.*, 12 Wend. (N. Y.) 452.

⁸ *Whitehurst v. North Carolina Mut. Ins. Co.*, 7 Jones, Law (N. C.), 433.

eleven days in another,¹ there being no sufficient excuse therefor, has been held to be unreasonable. Yet where the insurers had, contrary to their agreement, refused to issue a policy, they were held to have waived their right to object to a notice sent even eleven months after the loss.² Whether due diligence has been used in giving the notice is a question which is ordinarily left to the jury, to be found from all the circumstances in the case.³ But where the facts and circumstances bearing upon the question of due diligence are not in dispute, it becomes a question of law for the court.⁴

§ 463. **Notice by whom and to whom given.** — The assured, no other party being interested, is the proper person to give the notice. But although the notice is required from the insured, a notice signed by a third person at the request of the insured, though not on its face appearing to have been by his request, is a sufficient compliance with the requirement.⁵ If the policy has been assigned by the assured with the assent of the insurers, the notice of loss properly comes from the assignee.⁶ Notice from the real party in interest, though not insured, will doubtless be sufficient in any case.⁷ And a notice from the local agent of the company, upon information communicated to him by the assured, is sufficient.⁸ In many cases the policy designates the person to be notified as the president, secretary, or agent of the company. It is essential that in such cases the notice should be given to the person designated.⁹ Where it was provided in a policy which had been negotiated through a local agent of the defendant's that

¹ *Trask v. State Fire & Mar. Ins. Co.*, 29 Pa. St. 198.

² *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390.

³ *Edwards v. Baltimore Ins. Co.*, 3 Gill (Md.), 176; *O'Brien v. Phoenix Ins. Co.*, 76 N. Y. 459; *Continental Ins. Co. v. Lippold*, 3 Neb. 391.

⁴ *Kimball et als. v. Howard Fire Ins. Co.*, 8 Gray (Mass.), 33; *Bennett v. Lycoming Ins. Co.*, 67 N. Y. 274.

⁵ *Stimpson v. Monmouth Mut. Fire Ins. Co.*, 47 Me. 349.

⁶ *Cornell v. Le Roy*, 9 Wend. (N. Y.) 163.

⁷ *Graham v. Firemen's Ins. Co.*, C. Ct. (N. Y.), 9 Repr. 285; *Watertown Ins. Co. v. Grover*, 41 Mich. 131.

⁸ *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289.

⁹ *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; *Inland Ins. & Dep. Co. v. Stauffer*, 33 Pa. St. 397.

notice of loss must be given to the manager, "or to some known agent of the company;" before the loss the defendants had transferred their business to another company, and it was held that a notice of loss given to the local agent was sufficient, the plaintiff having had no notice of the change in business, or termination of the agency.¹ But a director is not an "authorized" officer to receive such a notice.² [Notice of loss to one held out to be an agent, and through whom the policy is issued, who receives the notice without demurring, is good notice to the company.³ A notice of loss addressed to one of two companies concerned, and served on the agent of both companies, who countersigned the policy, is sufficient to hold both companies.⁴]

§ 464. **Notice; Waiver.** — Although the notice of loss must be given, if required, and as required, yet as it is a stipulation for the advantage of the insurers, it is in their option to waive any delinquency on the part of the insured in this respect. And such a waiver will be inferred from any conduct on the part of the insurers clearly inconsistent with an intention to insist upon the failure to give due notice; as for instance, the payment of so much as they estimate the loss to be, though not so much as is claimed by the insured, or, in other words, a payment of a part of the amount claimed to be due under the policy;⁵ or the special examination, known to the insured, by the agent of the insurers, and the making a schedule of the property burned;⁶ or a direction to go on and furnish the proofs.⁷ [Receiving and acting on an oral notice waives a written one.⁸ A policy provided for written notice of death. Oral notice was given to O., the agent. He gave the company notice, and they gave him blank affidavits, which were after-

¹ *Marsden v. City & County Ass. Co.*, 1 Law Rep. (C. P.) 232.

² *Inland Ins. & Dep. Co. v. Stauffer*, 33 Pa. St. 397.

³ [*Kendall v. Holland Purchase Ins. Co.*, 2 T. & C. 375 at 376.]

⁴ [*Bernero v. South British, &c. Ins. Co.*, 65 Cal. 386.]

⁵ *Westlake v. St. Lawrence Mut. Ins. Co.*, 14 Barb. (N. Y.) 206, 207.

⁶ *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389; *ante*, § 461; *Beatty v. Lycoming Ins. Co.*, 66 Pa. St. 9.

⁷ *Cann v. Imp. Fire Ins. Co.*, 1 R. & C. (Nova Scotia) 240.

⁸ [*Edwards v. Travelers' Life Ins. Co.*, 20 Fed. Rep. 661 (N. Y.), 1884.]

ward filled up and received by the company without objection. This was held a waiver of written notice of death.¹ When a company sends its agent to adjust a loss it is estopped from denying proper notice of loss.²] There seems to be no reason to doubt that a waiver is equally effectual whether the notice be a general statute requirement, or is provided for in the act of incorporation, or be a condition of the contract. Being all alike provisions for the benefit of the insured, they may be waived, even though the waiver apply to defects which are in violation of express statute provisions.³ A vote, however, to indefinitely postpone the question of the payment of a loss is no waiver of a condition in the policy requiring notice of a loss within thirty days. It is rather a refusal to allow anything on account of it. *A failure to give notice within the time required stands upon a different ground from a failure to give the notice in due form.* The latter defect may be remedied by a new and more accurate form, but the former, if insisted upon by the insurers, is irremediable. It may, indeed, be waived, but it would be reasonable to require a different kind of evidence from that which ought to be satisfactory in cases of a mere defect in form. The silence of the insurers upon a mere defect of form might be very injurious to the assured, since, if the defect were pointed out to him, he might at once supply the deficiency and save himself from loss. A failure to give the notice in due time, on the contrary, leaves the insured entirely at the mercy of the insurers, and to point out to him the fact will not in the least aid him to remedy the defect. The omission to point it out to him is therefore no wrong or prejudice or want of good faith towards him, nor is the insurer under any legal obligation so to do.⁴ [A letter

¹ [Travellers' Ins. Co. v. Edwards, 122 U. S. 457.]

² [Home Ins. Co. v. Myer, 93 Ill. 271 at 275.]

³ Lewis v. Monmouth Mut. Fire Ins. Co., 52 Me. 492.

⁴ Patrick v. Farmers' Ins. Co., 43 N. H. 621; St. Louis Ins. Co. v. Kyle, 11 Mo. 278; Edwards v. Balt. Fire Ins. Co., 3 Gill (Md.), 176; *post*, § 471. In American Express Co. v. Triumph Ins. Co., 5 Ins. L. J. 466, Dist. Ct. Hamilton Co., Ohio, it is said that the acceptance of proofs without objection had never been held a waiver of neglect in point of time, when the policy provided that the proofs should be presented as soon as possible. But see *contra*, Palmer v. St. Paul, &c. Ins. Co., 44 Wis. 201.

written to the assured by the company's agent (no authority appearing), stating that he would advise him of the loss and that an adjuster would probably be sent, is no waiver by the insurers of proper notice of loss.¹ In the absence of proof to that effect the soliciting agent or the adjusters are not to be presumed to have power to waive immediate notice.² An agent for adjustment may waive notice of loss, although the policy provides that acts or declarations of agents not contained in the policy shall not bind it.³

§ 465. **Preliminary Proofs; Who may furnish; Time and form; "Due Notice."** — Required preliminary proofs when furnished are only evidence that the insured has complied with the requisitions of the policy, and are inadmissible as evidence for the plaintiff to prove the issue on trial;⁴ and although the statements in them will be taken against the insured as admissions against interest,⁵ he may show that the statements themselves are without foundation, and were inadvertently made. Such inadvertent mistakes are without effect to estop the insured from showing the truth.⁶ [An honest error in stating the

¹ [Forest City Ins. Co. v. School Directors, 4 Ill. App. 145 at 148.]

² [Barre v. Council Bluffs Ins. Co., 76 Iowa, 609, 611.]

³ [Stevens v. Citizens' Ins. Co., 69 Iowa, 658.]

⁴ Citizens' Fire Ins. Co. v. Doll, 35 Md. 89; Newmark v. Lon. & Liv. Life & Fire Ins. Co., 30 Mo. 160; Newton v. Mut. Benefit Ins. Co., 2 Dillon, C. Ct. 154; Planters' Ins. Co. v. Comfort, 50 Miss. 662; Ætna Ins. Co. v. Farrell (Tenn.), 3 Ins. L. J. 852; Browne v. Clay Ins. Co., 68 Mo. 133; ante, § 460; [Commonwealth Ins. Co. v. Sennett, 41 Pa. St. 161 at 165. Knickerbocker Ins. Co. v. Gould, 80 Ill. 388 at 392-393 (no evidence of value). Proofs of loss made by the insured and admitted to show that he has complied with the requirements of his policy are for the judge. They are not to go to the jury, nor to be taken out with them. Kittanning Ins. Co. v. O'Neill, 110 Pa. St. 548. Indorsements on back of proofs of loss may be read to the jury to show when they were received by the company. Schwarzbach v. Protective Union, 27 W. Va. 622.]

⁵ [The proofs of loss introduced in evidence by the assured may be appealed to by the company to prove the vacancy of the house, or other fact admitted therein by the assured. N. A. F. Ins. Co. v. Zaenger, 63 Ill. 462 at 467; Insurance Co. v. Newton, 22 Wall. 32 at 35.]

⁶ McMaster v. Insurance Co. of North America, 55 N. Y. 222; Hayes v. Union, &c. Ins. Co., 44 U. C. (Q. B.) 360; Mutual Ben. Ins. Co. v. Newton, 22 Wall. (U. S.) 32; Connecticut Ins. Co. v. Schwenk, 94 U. S. 593; Maher v. Hibernia Ins. Co., 67 N. Y. 283; American, &c. Ins. Co. v. Day, 39 N. J. 89. [Mosley v. Vt. Mut. Fire Ins. Co., 55 Vt. 142; Ætna Ins. Co. v. Stevens, 48 Ill. 31 at 35 (inadvertent omission of some articles). When one stated in the proofs

value of the property lost is not fatal. The amount recovered may be more than that named in the proofs of loss.¹ What the goods brought at auction and the cost of manufacture of such goods are proper subjects of inquiry in estimating the value of the goods lost.² And in regard to the auction if an attempt is made to show that such a sale is not the mode which a prudent man desiring to make the most of his goods would pursue, the plaintiff may ask an expert in such matters if there is any better mode of disposing of such goods.³ If the policy provides, that a claim for more than is legally due shall avoid the policy, it must be shown that the excessive claim was made with fraudulent intent.⁴ An overestimate of value in the proof of loss not fraudulent will not avoid the policy or render the proof insufficient, but a statement claiming for all the goods lost, and yet referring to only one of two buildings in which they were, is insufficient, under a policy making description of the buildings necessary.⁵ The same persons who may give and receive notice may doubtless furnish proofs and receive them;⁶ and where there are several policies with the

of loss that he was the "legal heir of his wife," the statement, though erroneous, was not held to be fatal, being made *bona fide*, and being not a matter of fact, but rather a conclusion of law which could not mislead. *Rohrbach v. Germania Ins. Co.*, 62 N. Y. 613 at 614. But when the policy provided that the interest of the assured should be stated in the proofs of loss, an omission to so state is fatal, unless waived by the company. *Shawmut Sug. Ref. Co. v. People's Mut. Fire Ins. Co.*, 12 Gray, 535 at 540.]

¹ [*Miaghan v. Hartford Fire Ins. Co.*, 24 Hun, 58. The proofs said \$800, and the complaint was amended to \$2000. *Lebanon Mut. Ins. Co. v. Kepler*, 106 Pa. St. 28.]

² [*Clement v. British Amer. Ins. Co.*, 141 Mass. 298.]

³ [*Ibid*]

⁴ [*Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737.]

⁵ [*Towne v. Springfield Fire & Mar. Ins. Co.*, 145 Mass. 582.]

⁶ *Ante*, § 463. [Proofs are sufficient though executed by the husband as agent of the wife whose property was insured, he having transacted the whole business, she having no personal knowledge of the property. *Findeisen v. Metropole Fire Ins. Co.*, 57 Vt. 520. When the company had recognized A. as the assured's agent by delivering the policy to and receiving the premium from him, it cannot after loss object to his right to furnish proofs. *Swan v. Liv. Lond. & Gl. Ins. Co.*, 52 Miss. 704 at 709. A mortgagee may supply proofs if the mortgagor neglects to do it, and may take advantage of any waiver of them by the company. *Nickerson v. Nickerson*, 80 Me. 100. Proof of loss to the general adjuster of the company who is attending to the claim in question is sufficient. *Merchants' &c. Ins. Co. v. Vining*, 67 Ga. 661.]

same subject-matter, issued by the same company, one set of preliminary proofs will be sufficient.¹

As to the *time* within which the preliminary proofs must be furnished, as in the case of notice, if it is specified definitely it must be complied with,² unless the condition is qualified, as by adding "and till furnished no action shall be brought."³ *Mailing* the proofs within the time seems to be sufficient.⁴ And if no definite time is fixed, they are to be furnished within a reasonable time.⁵ Looking at the circumstances and the object, even five years' delay has been held to be excusable, where the insured was not at fault, and the delay was chargeable to the conduct of the insurers.⁶ (*Excuses*) A failure to forward any proofs at all within the required time will be fatal, although the circumstances were such — as where the insured in an accident policy met with an instantaneous death, and no survivor knew of the existence of the policy — that it was impossible that notice could be given. The court said that this was not a case where the notice was rendered impossible by the act of God, for the insured might have provided for the contingency by informing some one of the existence of the policy.⁷ This certainly is applying the rule with great strictness, and seems hardly consistent with the recent decision in the Supreme Court of the United States, where it is held that if the insured be insane at the time when it becomes necessary to furnish his preliminary proof, this will excuse the non-performance of that re-

¹ Girard Life Ann. & Tr. Co. v. Mut. Life Ins. Co. (Pa.), 9 Weekly Notes of Cases, 425, 1881.

² Smith v. Haverhill Mut. Fire Ins. Co., 1 Allen (Mass.), 297.

³ Lafarge v. Liverpool, Lon. & Globe Ins. Co., 17 L. C. Jur. 237.

⁴ Badger v. Glens Falls Ins. Co., 49 Wis. 389; *post*, § 476.

⁵ [Miller v. Hartford Fire Ins. Co., 70 Iowa, 704.]

⁶ Columbia Ins. Co. v. Lawrence, 10 Pet. (U. S.) 507; Cammell v. Beaver, &c. Ins. Co., 39 U. C. (Q. B.) 1.

⁷ Gamble v. Accident Ass. Co., 4 Ir. R. C. L. 204. [And in another case where the policy is on condition that the assured or his representatives should in case of any accident give notice within a certain time, failure to do so is an answer to a suit on the policy, although death was caused instantaneously by the injury. Patton v. Employer's Liability Ass. Corp. Ir. L. R. 20 C. P. 93, (aff.); Gamble v. Acc. Ass. Co., Ir. R. 4 C. L. 204.] *Ante*, § 352.

quirement.¹ But inability by reason of loss of the policy is no excuse.² [When the insured is out of the country and cannot make the proofs required to be made by *him*, it is possible equity might grant relief.³ If immediate notice of total loss is given, no further notice or proof is necessary.⁴ But the rule that notice of the *total* destruction of a building dispenses with further proofs of loss though required by the contract in general terms, does not apply to the total loss of the *contents* of a building comprising a variety of articles.⁵ When the assured had been examined under oath after loss, by the insurers, and his books had been in their hands, it was held that he must still furnish proofs of loss.⁶ Failure of the company to furnish the usual blanks is no excuse. Returns required to be made to the company would be sufficient in ordinary writing or print, without any blank form, and as the furnishing of these is a mere convenience and courtesy, a custom to do so cannot give such a right to them that failure to furnish them will excuse the returns.⁷ Where the fire occurred January 17th, and the proofs were prepared January 22d, and received by the agent "early in February" (he could not state the exact date), it was held proper for the jury to presume that they were received within the prescribed time of fifteen days.⁸ If the policy says the insured "shall" furnish proofs of loss within a certain time, but does not make it a condition of the contract, delay in sending the proofs will not work a forfeiture.⁹ (*Waiver.*) If the company proceed to adjust

¹ *Germania Fire Ins. Co. et als. v. Boykin*, 12 Wall. (U. S.) 433. And see also *Insurance Companies v. Weides*, 14 id. 375; *Wheeler v. Conn. Mut. Life Ins. Co.*, 5 Ins. L. J. 399; *Baldwin's Case*, *ante*, § 335. The last two cases are, however, overruled in *Wheeler v. Conn. Ins. Co.*, 10 Ins. L. J. 116, where the whole subject is very elaborately discussed. See further as to act of God, *Am. Law Rev.*, Oct., 1876, p. 186.

² *Blakeley v. Phoenix Ins. Co.*, 20 Wis. 205. And see *post*, § 475.

³ [*Walsh's Admr. v. Vt. Mut. Fire Ins. Co.*, 54 Vt. 351.]

⁴ [*Penn Fire Ins. Co. v. Dougherty*, 102 Pa. St. 568.]

⁵ [*Universal Ins. Co. v. Weiss*, 106 Pa. St. 20.]

⁶ [*Gauche v. London & Lancashire Ins. Co.*, 4 Woods (U. S.), 102 at 106.]

⁷ [*Palmer, &c. v. Factors', &c. Ins. Co.*, 33 La. Ann. 1336, 1338.]

⁸ [*Peppit v. North Brit. & Mer. Ins. Co.*, 1 Russ. & Geld. (Nova Scotia), 219.]

⁹ [*Carpenter v. German-Amer. Ins. Co.*, 52 Hun, 249.]

the loss, or otherwise so act as to induce the plaintiff as a reasonable man to think no proof will be required, and so he allows the time limited for filing proofs to pass, the company cannot insist on the time limit.¹ So is sending proofs back with objections for correction, but without objecting that they were not filed in time.² So if they refuse to pay on other grounds, not mentioning this.³ If without objection the company receive and retain proofs furnished five months after the loss, it waives the requirement that proofs should be rendered in sixty days.⁴ Acts of officers in receiving informal verbal proofs and recognizing liability may go to the jury on the question of a waiver of the time of forwarding proofs.⁵ When the secretary of the company interfered with the agent of the assured, prevented him from making proofs within the required time, the company was held estopped from setting this up as a defence.⁶ But a conversation in which the agent tells the assured that his claim is all right, and the adjuster will be around in a few days and fix the thing up and pay him, does not excuse the furnishing of proofs within the ten days limited therefor.⁷ And when the assured sent notice of loss, a letter from the secretary of the company acknowledging its receipt and the request for proof blanks, and adding, "We have no proof blanks at hand. It will probably be two weeks before our adjuster can reach this case" was held not to be a waiver of the service of proofs of loss within the required time.⁸ That the agent acknowledges the receipt of delayed proofs of loss, and calls attention to other breaches of condition, does not waive the breach by delay in proving loss.⁹ A local agent simply authorized to fix rates and countersign

¹ [Gale v. State Ins. Co., 33 Mo. App. 664; Creighton v. Agri. Ins. Co., 39 Hun, 319.]

² [German Fire Ins. Co. v. Grunert, 112 Ill. 74.]

³ [State Ins. Co. v. Maackens, 38 N. J. L. 564.]

⁴ [Commercial Union Ass. Co. v. Hocking, 115 Pa. St. 407.]

⁵ [Thierolf v. Universal Fire Ins. Co., 110 Pa. St. 87.]

⁶ [State Ins. Co. v. Todd, 83 Pa. St. 272 at 278.]

⁷ [Engebretson v. Hekla Fire Ins. Co., 58 Wis. 301.]

⁸ [Birmingham v. Farmers' Joint Stock Ins. Co., 67 Barb. 595 at 597.]

⁹ [Brown v. London Ass. Corp., 40 Hun, 101.]

and deliver policies cannot waive a provision requiring proofs within thirty days after loss.¹]

If any particular facts are required to be proved, or any particular mode of proof is required, the facts must be proved, and in substantially the mode specified, or excuse shown. If *books of account and vouchers* are required, they must be produced,² *unless excused*, as where they were destroyed by the fire which occasioned the loss,³ or where without fault they were not within the control of the assured,⁴ or if it should appear that he kept no books.⁵ [Where the plaintiff *cannot* get some of the proofs required he will be excused from a literal compliance.⁶ The law will not require an impossible thing, and where, owing to the destruction of books and papers, the insured cannot make a specific statement or inventory of the property destroyed, the policy will be sufficiently complied with by furnishing such proofs as are within the power of the assured.⁷ Where the policy stipulates that the insured shall in case of loss submit invoices and vouchers, and also duplicates, and the former are burned, and the duplicates cannot be obtained after diligent effort, recovery is not defeated thereby.⁸ The violation of such a stipulation will not necessarily avoid the policy, but will be a matter for the consideration of the jury.⁹ If the policy stipulates for an appraisal of the loss on demand of either party, and a report of such appraisal under oath as part of the proofs, as a condition precedent to action the agreement will be sustained.¹⁰] No doubt the usual stipula-

¹ [Bowlín v. Hekla Fire Ins. Co., 36 Minn. 433.]

² Cinqu Mars v. Eq. Ins. Co., 15 U. C. (Q. B.) 143, 246; Jube v. Brooklyn Fire Ins. Co., 28 Barb. (N. Y.) 412; Farmers' Ins. Co. v. Mispelhorn, 50 Md. 180; [O'Brien v. Commercial Fire Ins. Co., 63 N. Y. 108 at 112.]

³ Mechanics' Fire Ins. Co. v. Nichols, 1 Harr. (N. J.) 410. And see *ante*, § 335; *post*, § 474.

⁴ Huckberger v. Prov. Wash. Ins. Co., U. S. C. Ct., North Dist. Ill., Davis, J., 1 Chicago Legal News, 353. And see *post*, § 475.

⁵ Wightman v. West. Mar. & Fire Ins. Co., 8 Rob. (La.) 442.

⁶ [Eggleston v. Council Bluffs Ins. Co., 65 Iowa, 308.]

⁷ [People's Fire Ins. Co. v. Pulver, 127 Ill. 246.]

⁸ [Miller v. Hartford Fire Ins. Co., 70 Iowa, 704.]

⁹ [Insurance Co. v. Starr, 71 Tex. 733.]

¹⁰ [Life Ass. v. Goode, 71 Tex. 90.]

tions that the insured shall furnish certain preliminary proofs of loss, when loss has been sustained, are conditions precedent, without compliance with which no recovery for a loss can be had. But in conformity to the general rule applicable to conditions precedent, a failure to comply with which works a forfeiture, they will be construed strictly against the insurers, for whose benefit they are imposed, and liberally in favor of the insured, upon whom they impose burdens more or less onerous; so that the latter will be held to nothing in this behalf not expressly required by the terms of the condition.¹ And if loss from certain enumerated causes is excepted out of the risks assumed by the policy, it is enough to state that the loss was by a cause not excepted, without negating the fact that the loss was within the excepted risks.² So if it be required to state whether any and what insurance has been made on the property, the statement that the property "was not, nor has been insured since the policy was taken out," will suffice.³

"*Due notice and proof of death*" is such notice and proof as shall appear to the court according to the rules of evidence to be due, and not such as in the opinion of the insurers, or other insurance companies, may be due. And a pamphlet given to the assured at the time he gives notice of the loss, setting forth the proof required, has no binding force on the assured, unless it be shown that he has agreed to it in some way, or was so well aware of these requirements that he may be presumed to have contracted with reference to them as

¹ *Gelatly v. Minnesota, &c. Soc.* (Minn.), *Weekly Jurist*, 1880; *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner (U. S.), 434; *Wellcome v. People's Equitable Mut. Fire Ins. Co.*, 2 Gray (Mass.), 480; *Mason v. Harvey*, 8 Wel., Hurl. & Gor. (Exch.) 819; *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1; *Roper v. London*, 1 Ell. & Ell. (Q. B.) 825; *Commonwealth Ins. Co. v. Sennett*, 41 Pa. St. 161; *Blakeley v. Phoenix Ins. Co.*, 20 Wis. 205; *Bumstead v. Dividend Mut. Ins. Co.*, 2 Ker. (N. Y.) 81; *Gilbert v. North American Ins. Co.*, 23 Wend. (N. Y.) 43; *Battaille v. Merchants' Ins. Co.*, 3 Rob. (La.) 384; *Great Western Ins. Co. v. Staaden*, 26 Ill. 360; *ante*, § 460.

² *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner (U. S.), 434; *Lounsbury v. Prot. Ins. Co.*, 8 Conn. 459.

³ *Lounsbury v. Prot. Ins. Co.*, 8 Conn. 459.

customary.¹ And a bare notice, not objected to before trial, will be sufficient.² The proviso will be liberally construed to save a forfeiture; and unless the policy expressly calls for specific information, and sets forth what the proof shall be, no particular kind of proof can be insisted on, provided it furnish such evidence, within the reasonable efforts of the insured to obtain, as ought to be satisfactory.³ And if the policy provides for satisfactory proof of the death, and such further evidence as the directors may think necessary to establish their claim, this can only be understood to mean such evidence as the directors might reasonably, and not such as they might unreasonably and capriciously, require.⁴ But this, if reasonable and required, must be produced as a condition precedent to suit.⁵ [Where prior to the death the company has declared the policy forfeit it is not necessary to show that proof of death was made before suit.⁶ Where the by-law of a mutual society requires the secretary on notice of death to send blanks and instructions to the representatives of the deceased, a failure to do so waives the preliminary proofs of death.⁷ There is a *presumption* of death after seven years' absence during which time the person is not heard of or known to be living.⁸ But however long a person may be absent or wherever he may be, if he has had a known and fixed residence during that time he ought not to be presumed dead

¹ Taylor v. Ætna Life Ins. Co., 13 Gray (Mass.), 434. But see Woodfin v. Asheville Ins. Co., 6 Jones (N. C.), 558.

² Heath v. Franklin Ins. Co., 1 Cush. (Mass.) 257. But see *contra*, O'Reilly v. Guardian Ins. Co., 60 N. Y. 169. Probate records and inquests are only *prima facie* evidence of death. They are no evidence of the causes of death. Mutual Ben. Ins. Co. v. Tisdale, 91 U. S. 238; Mutual Life Ins. Co. v. Schmidt (Ohio), 8 Am. L. Record, 829. How far absence is proof, see Hancock v. American Life Ins. Co., 62 Mo. 26; Tisdale v. Conn. Mut. Life Ins. Co., 26 Iowa, 170.

³ Mason v. Harvey, 8 Exch. 819; Walsh v. Wash. Mar. Ins. Co., 32 N. Y. 427. And see also the two cases last cited.

⁴ Braunstein v. Accidental Death Ins. Co., 1 B. & S. 782; North American Ins. Co. v. Burroughs, 69 Pa. St. 43; Moore v. Woolsey, 4 El. & B. 243.

⁵ Fawcett v. Liv., Lon., & Globe Ins. Co., 27 U. C. (Q. B.) 225.

⁶ [Girard Life Ins. &c. Co. v. Mut. Life Ins. Co., 97 Pa. St. 15.]

⁷ [Covenant Mut. Ben. Ass. v. Spies, 114 Ill. 463.]

⁸ [Tilly v. Tilly, 2 Bl. Ch. Md. 436; Cofer v. Flanagan, 1 Ga. 538; Loring v. Steineman, 1 Met. 204; White v. Mann, 26 Me. 361.]

until inquiries have been made at that place.¹ Where a man is proved to have been living within seven years the burden of proving his death is on him who asserts it.² When a presumption of death arises after a seven years' absence, death must generally be supposed to have taken place on the last day of that time, in the absence of any evidence on the point.³ On the contrary, however, it is held that when the presumption arises after a seven years' absence the law makes no further presumption as to the particular point in the seven years at which the death occurred.⁴ In a disaster by which two persons are killed any means of ascertaining which perished first, though but a shadow, must be relied on. Therefore where in a ship's boiler explosion A. is known to have survived the explosion, and was seen a few minutes later alive, but B. was not seen after the explosion, and where, further, B.'s berth was in the part of the vessel which was nearer the explosion, the conclusion is that A. was the survivor.⁵ But mere knowledge of age and sex of two persons who perished in the same disaster does not raise any presumption, nor are they sufficient of themselves to warrant a finding that one perished before the other.⁶ In the first case the persons were a father of seventy years and a daughter of thirty-three.]

§ 466. **Preliminary Proof; Form and Mode; Certificate of Magistrate; Examination on Oath.** — We have just said that the preliminary proof must be substantially in the mode required. It has been, indeed, very generally held that the production of the certificate of "the minister, &c., of the parish," that he knew and verily believed that the loss really happened by misfortune and not by fraud, if required, was a condition precedent to recovery, although he had refused, without rea-

¹ [McCartee v. Camel, 1 Barb. Ch. 455.]

² [Gilleland v. Martin, 3 McLean, 490; Rex v. Harborne, 2 Ad. & El. 543.]

³ [Burr v. Sim, 4 Wharton (Pa.), 150, 170, "always"; Smith v. Knowlton, 11 N. H. 191, 196, "generally so."]

⁴ [Doe v. Nepean, 5 Barn. & Adolph. 86, 94; Nepean v. Doe, 2 Mees. & Wels. 894, 912; McCartee v. Camel, 1 Barb. Ch. 455: *In re Benham's Trust*, 4 L. R. Eq. 416, 419.]

⁵ [Pell v. Ball Cheves Ch. (S. C.) 99.]

⁶ [Coye v. Leach, 8 Met. 371; Mason v. Mason, 1 Meriv. Ch. 308 (father and son).]

sonable cause, to give such a certificate.¹ So, if a similar certificate from the "nearest magistrate,"² or from a "magistrate of the city,"³ or an affidavit of persons present at the fire, be required.⁴ But in such cases the court will not go into a

¹ *Worsley v. Wood*, 6 T. R. 716; *Johnson v. Phoenix Ins. Co.*, 112 Mass. 49; *Edgerly v. Farmers' Ins. Co.*, 48 Iowa, 644; *Racine v. Equitable Ins. Co.*, 6 L. C. Jour. 89; *O'Connor v. Com. Un. Ins. Co.*, 3 R. & C. (Nova Scotia) 119. In this case an acknowledgment of the receipt of a magistrate's certificate, stated, with an excuse, to be other than the magistrate required, no objection being made to the irregularity, was held somewhat strictly to be no waiver. See *post*, § 508. In a subsequent case in the same court, the learned Judge James, referring to *O'Connor's case*, *supra*, says: "I think it still open to discussion whether there may not be circumstances in which a party insured might be permitted to pass by the most contiguous justice of the peace, provided that course were adopted in good faith, for good and reasonable cause. The nearest justice might be a lunatic, . . . or he might be unable to attend to the duty, or he might be under suspicion himself as the incendiary, . . . or on terms of intense hostility to the insured, or . . . a very ignorant person, or of intemperate habits." *Herkins v. Prov. Ins. Co.*, 3 R. & C. (Nova Scotia) 176.

² *Cornell v. Hope Ins. Co.*, 3 Martin (La.) N. S. 223; 7 Martin (La.), 476; *Roumage v. Mechanics' Ins. Co.*, 1 Green (N. J.), 110; *Noonan v. Hartford Fire Ins. Co.*, 21 Mo. 81; *Leadbetter v. Ætna Ins. Co.*, 13 Me. 265; *Columbian Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507; *Moody v. Ætna Ins. Co.*, Thomson (N. S. Law), 173. [Where the insured applied to the nearest magistrates and they refused, and he sent a certificate from the next nearest, it was held that the condition was broken and the policy void. *Logan v. Commercial Union Ins. Co.*, 13 Can. Supr. Ct. 270. On the other hand, a stipulation that the nearest magistrate or justice shall certify to the loss, &c., has been held void, as the company has no right to require a public officer to act in adjusting its risks. *Universal Fire Ins. Co. v. Block*, 109 Pa. St. 535. Where the policy required a certificate from the magistrate *living* nearest the place of fire, and a certificate was obtained from the magistrate whose *place of business* was nearest, the court would not allow the company to escape on such a technicality. *Agricultural Ins. Co. v. Bemiller*, 70 Md. 400. If a certificate of the "nearest magistrate or notary" is required, it will not do to send a certificate from the nearest justice, when there are notaries materially nearer. *Williams v. Queen's Ins. Co.*, 39 Fed. Rep. 167 (Conn.) 1889. Where a statement is to be sworn before a justice of the peace, and instead is sworn before a notary, it seems that the policy is substantially complied with. *Ben Franklin Fire Ins. Co. v. Flynn*, 98 Pa. St. 628. But Wisconsin holds that a notary public is not a *magistrate* within the meaning of a policy, requiring the proofs to be accompanied by a magistrate's certificate, but if the company receive a notarial certificate and retain it without objection, the condition is waived. *Cayon v. Dwelling-House Ins. Co.*, 68 Wis. 570.]

³ *Prot. Ins. Co. v. Pherson*, 5 Ind. 417; *Scott v. Phoenix Ass. Co.*, Stuart (L. C.), 354.

⁴ *Alderman v. West of Scotland Ins. Co.*, 5 U. C. (Q. B. o. s.) 37.

nice calculation to ascertain whether some other magistrate than the one whose certificate is presented does not live, or, if he does not live, have his office nearer than the certifying one. This is a case for the application of the maxim *de minimis non curat lex*. The spirit of the condition requires no such mathematical precision.¹ Its object is completely secured by the proximity of the certifying magistrate. If such a rigid rule were to be applied, the condition would become impossible of execution if two magistrates should be found to be living equidistant.² And where two magistrates were nearer than the one whose certificate was procured, but they were creditors of the insured, it was held that the magistrate whose certificate was obtained was the proper officer to certify.³ Indeed, in this latter case, the court were inclined to deny to the provision the validity and effect of a condition precedent, but rather to treat it as directory only. In Canada the courts, under the authority of a statute (Ottawa, 36 Vict. c. 44, § 33), have declared the condition unreasonable.⁴ And in some of the States it has been substantially abrogated by legislation.⁵ So where several magistrates had their places of business nearer to the fire than the place of business of the magistrate who certified, though there was no evidence that their places of residence were nearer, the certificate was held sufficient.⁶ And in *Cornell v. Le Roy*⁷ the testimony of a witness that he thought the certifying magistrate lived nearer the insured premises than another magistrate named, but was not

¹ [When the policy provides that an affidavit of loss shall be made before the nearest officer, and there are several in the immediate neighborhood, the difference of a few feet as to nearness will not be considered. *American Cent. Ins. Co. v. Rothchild*, 82 Ill. 166 at 167.]

² *Turley v. North American Fire Ins. Co.*, 2 Wend. (N. Y.) 379; *Williams v. Niagara Ins. Co.*, 50 Iowa, 561; *Dolliver v. St. Joseph's Ins. Co.*, 128 Mass. 315.

³ *Ætna Ins. Co. v. Miers*, 5 Sneed (Tenn.), 139. And see *post*, § 473.

⁴ *Shannon v. Hastings Ins. Co.*, 2 Ont. App. Rep. 81.

⁵ *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315.

⁶ *Longhurst v. Conway Fire Ins. Co.*, Dist. Ct. (U. S.) Iowa, Northern Dist., 1861, cited in *Digest of Fire Insurance Cases*. See also *Peoria Mar. & Fire Ins. Co. v. Whitehill*, 25 Ill. 466.

⁷ 9 Wend. (N. Y.) 163.

certain, and did not know but other magistrates resided nearer than the certifying one, was held sufficient *prima facie* proof of the allegation that the certificate was that of the nearest magistrate. In *Ætna Fire Insurance Company v. Tyler*,¹ a certificate which omitted such important facts, though required, as that the person certifying was acquainted with the character and circumstances of the insured, and also the amount of damage sustained by him, was held to be sufficient; the magistrate having stated that "he was acquainted with him," and that he "had sustained loss or damage to the amount of the buildings therein mentioned,"—that is, in the affidavit of the insured,—the whole being in the opinion of the court a substantial equivalent. And in *Bilbrough v. Metropolis Insurance Company*,² it was held too late to make the objection that the certificate was defective for the first time at the trial.³ So in *Ketchum v. Protection Insurance Company*,⁴ it was held unnecessary to prove that the magistrate certifying was not related to the deceased. And the statement in the certificate by the magistrate, that he is not interested, is *prima facie* evidence of the fact of disinterestedness.⁵ Where the requirement was of a "magistrate most contiguous to the place of the fire, and not concerned in the loss, as a creditor or otherwise, or related to the insured or sufferers," it was held if the "most contiguous" magistrate was a loser

¹ 16 Wend. (N. Y.) 385.

² 5 Duer (N. Y. Superior Ct.), 587; *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.) 357.

³ [If objection is not made within reasonable time after proofs are made, the condition as to the nearest magistrate, &c. is waived. *Nease v. Ætna Ins. Co.*, 18 Ins. L. J. 541, W. Va. March, 1889. But a delay of thirty-seven days before requiring the insured to send a certificate of the proper magistrate or notary, is not a waiver where no injury is sustained thereby. *Williams v. Queen's Ins. Co.*, 39 Fed. Rep. 167 (Conn.), 1889. And the receipt of proofs without objection to the absence of this certificate, by an agent whose only duty was to transmit the papers to the company, is no waiver of the requirement, nor is it a waiver that the company objected to payment on other grounds, nor that they held the proofs two years without calling attention to the defect. *Daniels v. Equitable Fire Ins. Co.*, 50 Conn. 551. The plaintiff knew perfectly well that the certificate was a condition precedent and that he had not furnished it.]

⁴ 1 Allen (N. B.), 136.

⁵ *Cornell v. Le Roy*, 9 Wend. (N. Y.) 163.

by the same fire he was disqualified. Whether the mere fact of his being a creditor would have disqualified him, was said to be a "matter of considerable doubt."¹ Where the certificate was to be of the nearest magistrate not "concerned in the loss," and the nearest magistrate had suffered by the fire supposed to have been set by the insured, he was held to be concerned in the loss so as to be incapacitated to certify.² If the magistrate's certificate required him to state that he is acquainted with, or has inquired into, the circumstances, and without stating either of these facts he states merely his belief that there is no fraud, it is insufficient.³ Nor can such a certificate or any other matter of proof be exacted by a mere notice that it will be required, or anything short of an express stipulation in the contract.⁴ And even the substitution of the certificate of another person not a magistrate, for that of the nearest magistrate, which is required by the policy, will be waived if received and assented to by the agent as sufficient.⁵ By statute in Maine⁶ the insured is to make oath to his statement of loss "before some disinterested magistrate;" and this obviates the objection under contracts made in that State that the certificate of the nearest magistrate, as is frequently required, should be obtained. And no informality in the certificate furnished under the statute, not objected to at the time when the certificate is furnished, can afterwards be objected to the claim of the plaintiff.⁷

If the insured absent himself so that he cannot, with due diligence, be found, it is tantamount to a refusal to be ex-

¹ *Ganong v. Ætna Ins. Co.*, 6 Allen (N. B.), 75.

² *Wright v. Hartford Ins. Co.*, 36 Wis. 522. But see *Dolliver v. St. Joseph's Ins. Co.*, 128 Mass. 315.

³ *Mason v. Andes Ins. Co.*, 23 U. C. (C. P.) 37; *Kerr v. British Am. Ass. Co.*, 32 U. C. (Q. B.) 569.

⁴ *Taylor v. Ætna Life Ins. Co.*, 13 Gray (Mass.), 434; *Miller v. Eagle L. & H. Ins. Co.*, 2 E. D. Smith (N. Y. C. C. P.) 268; *Peacock v. N. Y. Life Ins. Co.*, 1 Bosw. (N. Y. Superior Ct.) 338; *Mercantile Ins. Co. v. Holthaus*, 43 Mich. 423.

⁵ *Taylor v. Roger Williams Ins. Co.*, 51 N. H. 50.

⁶ 1861, c. 34, § 5.

⁷ *Bailey v. Hope Ins. Co.*, 56 Me. 474; *post*, § 474.

amined on oath. And a refusal, after a partial examination, to submit to further proper examination, will have the same effect.¹ But where the examination has been once completed, no new examination can be required.² Whether the conduct of the insured amounts to a refusal may become a question of fact for a jury.³ The demand itself for an examination must be made within reasonable time, and it is not reasonable to wait till after action brought, or till, proofs having been filed, payment has become due.⁴ Where the insurers exercise their right to make an examination of the insured on oath, and say nothing of other proofs, this will be taken as and for the furnishing of the proofs required.⁵ In such an examination the insured is only bound to answer such questions as have a material bearing upon the insurance and the loss.⁶ If the assured is bound to produce such evidence as the insurers should reasonably require, it will perhaps be for the jury to say if the requirement has been complied with.⁷ What is "sufficient proof" would be for the court.⁸

And it may be said, generally, that the tendency of the courts in the matter of preliminary proofs is to hold, as in the case of immaterial statements and such as do not concern the risk made warranties by express stipulation, that a substantial compliance is all that is necessary; and in some cases the substitution of equivalents has been allowed.⁹

§ 467. **Life Insurance ; Preliminary Proof ; Family Physician.**

— That the insurers may have an opportunity the better to investigate the causes of death for their own satisfaction, if they so desire, it is usually provided that the preliminary proofs shall give the name or names of the attending physician

¹ *Bonner v. Home Ins. Co.*, 13 Wis. 677 ; *Harris v. Phoenix Ins. Co.*, 35 Conn. 310.

² *Moore v. Protection Ins. Co.*, 29 Me. 97.

³ *Phillips v. Protection Ins. Co.*, 14 Mo. 220.

⁴ *Aurora Ins. Co. v. Johnson*, 46 Ind. 315.

⁵ *Badger v. Phoenix Ins. Co.*, 49 Wis. 389.

⁶ *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410 ; *Insurance v. Weides*, 14 Wall. (U. S.) 375.

⁷ *Fawcett v. Liverpool, &c. Ins. Co.*, 27 U. C. (Q. B.) 225.

⁸ *North American Life Ins. Co. v. Burroughs*, 69 Pa. St. 43.

⁹ See *ante*, § 163.

or physicians; and where a friend and neighbor of the deceased, who was a regular physician, but who had abandoned the practice of his profession, was called in because it was deemed advisable to have the advice of a physician at once, and before the possible arrival of the regular family physician, who had been summoned and in due time attended, it was held that by the attending physician was meant the usual family physician, and his name only need be given in the preliminary proof.¹ [An unverified surgeon's certificate, not giving the extent of damage, is insufficient proof of loss.²]

§ 468. **Preliminary Proof; Waiver.** — But the incompleteness and even non-production of all preliminary proof may be waived, and will be excused on the ground of waiver, by the insurers, if their conduct is such as to induce delay,³ or to render the production or correction useless or unavailing, or as to induce in the mind of the insured a belief that no proofs will be required, as where an agent of the insurers has collected the proofs himself,⁴ or that those already furnished, though in fact defective, are satisfactory, and therefore sufficient. If the insurers intend to insist upon defects in the preliminary proof, they should indicate their intention in such a way that the insurer may not be deceived into a false security, and at such time that he shall have opportunity to supply the defects. If they wish further information they should point out in what respect, or they will be presumed to be content with what has been furnished.⁵ And the burden of proof of notice of the defect is on the insurers. "It is to be observed," say the court in another case,⁶ "that it is the duty of the insurers, pending the consideration of the proofs of loss, to bear themselves with all good faith towards the claimant,

¹ Gibson v. American Mut. Life Ins. Co., 37 N. Y. (10 Tiff.) 580.

² [Welsh v. Des Moines Ins. Co., 71 Iowa, 337, Ch. 211, Laws of 1880, § 3.]

³ Hutchinson v. Niagara Ins. Co., 39 U. C. (Q. B.) 483; Georgia Ins. Co. v. Kinnier, 28 Grat. (Va.) 88.

⁴ Kennedy v. Home Ins. Co. (Tenn.), 6 Ins. L. J. 359.

⁵ Charleston Ins. Co. v. Neve, 2 McMullan (S. C.), 237; Lewis v. Monmouth Mut. Fire Ins. Co., 52 Me. 492; Winnesheik Ins. Co. v. Schueller, 60 Ill. 465; Post v. Ætna Ins. Co., 43 Barb. (N. Y.) 351; Killips v. Putnam Fire Ins. Co., 28 Wis. 472; O'Conner v. Hartford Fire Ins. Co., 31 Wis. 160.

⁶ Harris v. Phoenix Ins. Co., 35 Conn. 310.

and if they are dissatisfied with the proof furnished, and have, or have not, the right to demand further proof before their liability becomes fixed, they ought to make known' to the assured the fact and the nature of these demands without unnecessary delay. Otherwise they will be held to have waived their rights in this regard." As deficiencies in the preliminary proof may be supplied whenever objection to pay the loss is put upon that ground, good faith on the part of the insurers requires that, if they mean to insist upon formal defects, they should apprise the insured of the deficiencies, or put their refusal upon that ground, as well as others, so as to give him an opportunity to supply the defect before it is too late.¹ Thus, where the insurers refuse to pay on special grounds, as that the contract was never completed,² or that the insured had no interest,³ or any other grounds having no reference to the sufficiency or insufficiency of the preliminary proof, it is a waiver of their right to object to any deficiency in this particular.⁴ So upon the ground of inconsistency with an intention to require further or better proofs, part payment of a loss, or a promise to pay it, or an adjustment, without objection to the absence or sufficiency of preliminary proof, is a waiver.⁵ Where the reinsurers stipulate that the re-

¹ *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 85; *Bodle v. Chenango County Mut. Ins. Co.*, 2 Comst. (N. Y.) 53; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *O'Neil v. Buffalo Fire Ins. Co.*, 3 Comst. (N. Y.) 122; *Clark v. New England Ins. Co.*, 6 Cush. (Mass.) 342; *Insurance Co. v. Connor*, 5 Harris (Pa.), 136; *McMasters v. West Chester County Mut. Ins. Co.*, 25 Wend. (N. Y.) 379; *post*, § 488; *Hibernia Ins. Co. v. Meyer*, 39 N. J. 482; *Mercantile Ins. Co. v. Holthaus*, 43 Mich. 423; *Planters' Ins. Co. v. Deford*, 38 Md. 382; *Tisdale v. Mut. Benefit Ins. Co.*, 91 U. S. 238; *Mason v. Citizens' Ins. Co.*, 10 W. Va. 572; *Madsden v. Phoenix Ins. Co.*, 1 S. C. n. s. 24.

² *Tayloe v. Merchants' Ins. Co.*, 9 How. (U. S.) 390.

³ *Coursin v. Penn Ins. Co.*, 46 Pa. St. 323.

⁴ *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.) 257. The New Brunswick Supreme Court holds mere silence on or after production of preliminary proof to be no waiver. But if objection be made to payment of loss on other grounds, it is evidence of a waiver, on the ground of defective proof. *McManus v. Ætna Ins. Co.*, 6 Allen (N. B.), 315.

⁵ *Westlake v. St. Lawrence County Mut. Ins. Co.*, 14 Barb. (N. Y.) 206; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241; *Eastern R. R. Co. v. Relief Ins. Co.*, 105 Mass. 570; *Owen v. Farmers', &c. Ins. Co.*, 57 Barb. (N. Y.) 518; *State Ins. Co. v. Todd*, 83 Pa. St. 272.

insured policy is subject to the conditions of settlement as set forth in the latter, no preliminary proof need be furnished by the latter to the former.¹

§ 469. **Preliminary Proof; Waiver; General Denial of Liability.** — A distinct denial of liability and refusal to pay, on the ground that there is no contract, or that there is no liability, is a waiver of the condition requiring proof of the loss.² It is equivalent to a declaration that they will not pay, though the proof be furnished; and to require the presentation of proof in such a case, when it can be of no importance to either party, and the conduct of the party in favor of whom the stipulation is made has rendered it practically superfluous, is but an idle formality, the observance of which the law will not require. So if the insurers decline to pay without giving any reason upon which to rest their refusal, such a

¹ Consolidated, &c. Fire Ins. Co. v. Cashow, 41 Md. 59.

² [A refusal to pay on other grounds or a denial of liability without giving reasons, waives the furnishing of proofs, or defects in them if they have been furnished. *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; *Com. Union Ass. Co. v. Scammon*, 126 Ill. 355; *Protective Union v. Whitt*, 36 Kans. 760; *Daul v. Firemen's Ins. Co.*, 85 La. Ann. 98; *Firemen's Ins. Co. v. Floss & Co.*, 67 Md. 403; *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131; *Farmers' Mut. Ins. Co. v. Moyer*, 97 Pa. St. 441; *Penn Fire Ins. Co. v. Dougherty*, 102 Pa. St. 568; *Bennett v. Maryland Ins. Co.*, 14 Blatch. 422 at 425; *Vos v. Robinson*, 9 Johns. 192 at 196; *Basch v. Humboldt Ins. Co.*, 35 N. J. L. 429 at 432; *Martin v. Fishing Ins. Co.*, 20 Pick. 389 at 398; *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. St. 149; *Walsh's Admr. v. Vermont Mut. Fire Ins. Co.*, 54 Vt. 351; *Mosley v. Vermont Mut. Fire Ins. Co.*, 55 Vt. 142; *King v. Hekla Fire Ins. Co.*, 58 Wis. 508; *Scammon v. Commercial Union Ins. Co.*, 20 Brad. 500; *Suppiger v. Covenant Mut. Ben. Ass.*, 20 Brad. 595; *New Home Life Ins. Ass. v. Hagler*, 23 Brad. 457; *Commercial Union Ass. Co. v. State*, 113 Ind. 331; *Carson v. German Ins. Co.*, 62 Iowa, 433; *Pendleton v. Knickerbocker Life Ins. Co.*, 5 Fed. Rep. 238 (Tenn.), 1881; *Millard v. Supr. Council of American Legion of Honor*, 81 Cal. 340; *McComas v. Covenant Mut. Life Ins. Co.*, 56 Mo. 573 at 576; *Mensing v. American Ins. Co.*, 36 Mo. App. 602; *Insurance Co. v. Lee*, 73 Tex. 641. Preliminary proof of death is not required if the insurer on being notified denies his liability wholly. *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696. Refusal to pay waives proof of loss permanently if for a permanent cause. *German-American Ins. Co. v. Davidson*, 67 Ga. 11. Temporarily if for a temporary cause. *Merchants', &c. Ins. Co. v. Vining*, 67 Ga. 661; 68 Ga. 197. Proof of loss is waived when the company places its refusal to pay on the sole ground that the insured had no insurable interest. *Grange Mill Co. v. Western Ass. Co.*, 118 Ill. 396.]

refusal, by necessary implication, gives the assured to understand that the production of preliminary proof will be useless,—an idle ceremony, which the law will not require him to perform.¹ So, if the refusal to pay is upon the ground that the property lost was not included in the risk,² or that the insured has forfeited his right to recover by fraud.³ Even where there has been no refusal to pay the loss, the preliminary proof being insufficient, if without objection on that account the insurers proceed to investigate the loss for themselves, it has been held that the evidence so obtained shall inure to the benefit of the insured as part of his preliminary proof.⁴ So, if the insurers throw any obstacles in the way of the insured in his efforts to bring the proofs within the requirements of the condition. Thus, where imperfect proofs have been filed within the required time, and the insured afterwards, upon being so informed, requests copies, which, after repeated evasions, are finally refused, corrected proofs filed after the expiration of the limited time will be suffi-

¹ *Allegre v. Maryland Ins. Co.*, 6 H. & J. (Md.) 408; *Harriman v. Queen Ins. Co.*, 49 Wis. 71; *Tayloe v. Merchants' Ins. Co.*, 9 How. (U. S.) 390; *Graves v. Wash. Mar. Ins. Co.*, 12 Allen (Mass.), 301; *Roberts, Adm., v. Cocke*, 28 Grat. (Va.) 207; *Girard Agr., &c. Co. v. Merchants' Life, &c. Co. (Pa.)*, 9 W. N. C. 425; *Goodwin v. Lancashire, &c. Ins. Co.*, 18 L. C. Jur. (Q. B.) 1; *West Rockingham Ins. Co. v. Sheets*, 26 Grat. (Va.) 854; *post*, § 471; *Aurora, &c. Ins. Co. v. Kranich*, 36 Mich. 289; *Bank of Oil City v. Guardian, &c. Ins. Co., C. C. P. (Pa.)*, 4 Ins. L. J. 473; *Portsmouth Ins. Co. v. Reynolds (Va.)*, 9 Ins. L. J. 60; *Akin v. Liverpool, &c. Ins. Co., C. Ct. (Ark.)*, 6 Ins. L. J. 341; *Williamsburg Ins. Co. v. Cary*, 83 Ill. 453; *Continental Ins. Co. v. Randolph (Ky.)*, 10 Ins. L. J. 387. Whether the facts and circumstances amount to a denial or refusal is for the jury. *Farmers' Ins. Co. v. Moyer (Pa.)*, 10 Ins. L. J. 514. In *Phoenix Ins. Co. v. Stevenson (Ky.)*, 8 Ins. L. J. 922, it was held that where, upon presentation of defective proofs, plaintiff was notified that if he had a claim the proofs must be made in accordance with the conditions of the contract, and also that he had forfeited his right to recover on another ground upon which the insurers could rely, there was no waiver. But their notice that they shall insist upon strict proof does not seem to meet the objection that the other notice shows that the proofs will be nugatory. Perhaps the assertion of the secretary, that they have no risk, made on the erroneous impression that the policy had been properly cancelled, is no waiver: *Bennett v. Lycoming Ins. Co.*, 67 N. Y. 274; though, if it mislead or hinder, why is it not an estoppel?

² *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285.

³ *Peoria Mar. & Fire Ins. Co. v. Whitehill*, 25 Ill. 466.

⁴ *Sexton v. Montgomery County Mut. Ins. Co.*, 9 Barb. (N. Y.) 191.

cient. In other words, the insurers will not be allowed to insist upon a deficiency which they have contributed to produce.¹ [When the agent admitted the proofs of loss and the money was paid into court, the company cannot afterwards object to the sufficiency of the proofs. Payment of the money into court admits the cause of action as stated in the declaration.²] And the waiver of the proof is a waiver of the condition that payment is not to be made till a limited time after the proof; so that, in such case, suit may be brought at once upon the denial of liability, although the time within which, after proof of loss, the payment would be demandable may not have expired.³

[If proofs have been furnished at the time of refusal to pay on other grounds than such as may relate to the proofs, or without stating grounds, *defects* in the proofs are waived thereby.⁴ "We do not consider ourselves answerable for the claim" is a waiver of defects in proofs of loss furnished.⁵ By asserting a cancellation of the policy, the company waives the right to insist on better proofs of loss.⁶ Where the claim is disputed by the company on other grounds, and no notice is given of the insufficiency of the proofs of loss, it is error to dismiss the complaint on the ground that the proofs are defective. The company should have given notice of the defects,

¹ Cornell v. Le Roy, 9 Wend. (N. Y.) 163. And see *ante*, § 361.

² Johnston v. Columbian Ins. Co., 7 Johns. 315 at 318.]

³ Nor. & N. Y. Trans. Co. v. Western Mass. Ins. Co., 34 Conn. 561; Williamsburg Ins. Co. v. Cary, 83 Ill. 453. The case of Columbia Ins. Co. v. Lawrence, 2 Pet. (U. S.) 25, to the contrary, has not been followed in the State courts, except in Roumage v. Mechanics' Ins. Co., 1 Green (N. J.), where it was held, by a divided court, that a refusal to pay on the general ground that the claim was believed to be fraudulent was no waiver. But in Columbia Ins. Co. v. Lawrence, 10 Pet. (U. S.) 507, the insured was held to have complied with the condition to furnish proof within reasonable time, though five years after the fire, because the company, by not objecting before the first trial, had misled the insured into a belief of the sufficiency.

⁴ [Whittle v. Farmville Ins. &c. Co., 3 Hughes, 421 at 422; Continental Life Ins. Co. v. Rogers, 119 Ill. 474; Lycoming Insurance Co. v. Dunmore, 75 Ill. 14 at 16.]

⁵ [Maryland Ins. Co. v. Bathurst, 5 G. & J. 159 at 238; La Société, &c., v. Morris, 34 La. Ann. 347 at 348.]

⁶ [Ball, &c., v. Aurora Ins. Co., 20 Fed. Rep. 232 at 236.]

so that they could have been corrected.¹ Entire repudiation of a policy without objection to the proofs implies a waiver of defects in them.² So, receiving proofs without objection and defending in other grounds,³ and failure to designate the error on which the company bases its refusal to pay.⁴]

§ 469 *a*. A single case in New York has recently led to much discussion, and, as it appears by the case itself, to much broader apparent decisions than were called for by the facts, and surprisingly contradictory, considering that the facts appeared to be substantially the same. In the first, where preliminary proofs, which were to be given "as soon as possible" after notice, were not furnished for more than two months and a half, during which the insurers repeatedly intimated there was fraud, it was held that upon the undisputed facts the question of reasonable time was for the court; that, there being no hindrances or delays, the proofs were not offered within a reasonable time; that, till they were offered, the insurers had a right to keep silent; and that their refusal after they were offered to pay solely on the ground of fraud was no estoppel to such a defence, since at the time of the refusal the insured had lost all rights without fault of the insurers, and were in no way prejudiced or misled, and that no liability can be reimposed by a mere waiver, but only by a new agreement upon a new consideration, or by acts which operate as an estoppel against the insurer.⁵ Brink's case⁶ was again before the court, where it was said that it was formerly sent back for trial, on the sole ground that it was thought by a majority of the court that the charge of the trial judge, to the effect that "if at any time the defendant objected to paying the loss upon the ground of fraud, no proofs of loss need be served," was too broad, and might include mere incidental declarations not indicating a fixed

¹ [Karelsen v. Sun Fire Office, 45 Hun, 144, 147.]

² [Rumsey v. Phoenix Ins. Co., 1 Fed. Rep. 396 (N. Y.) 1880.]

³ [Donahue v. Windsor Co. Mut. Fire Ins. Co., 56 Vt. 374.]

⁴ [Amer. Cent. Ins. Co. v. Brown, 29 Ill. App. 602.]

⁵ Brink v. Hanover Fire Ins. Co., 70 N. Y. 593, citing Beatty v. Lycoming Ins. Co., 66 Pa. St. 9.

⁶ 80 N. Y. 108.

purpose on the part of the company, or relied on by the insured; that the facts were such that a jury would be justified in finding that proof was made "as soon as reasonably possible under the circumstances," and that the defendants offered hindrances and delays whereon they could be estopped; and that it is now the established doctrine of the court that no new consideration is necessary to support a waiver which may exist when there is no technical estoppel, if the facts show an intention to waive.¹

[§ 469 B. Defects waived by Omission of the Insurer to call attention to them promptly and specifically, and give Opportunity for Correction.²—The company must object to the proofs within a reasonable time, and what is a reasonable time, being a mixed question of law and fact, should be given to the jury under proper instructions.³ An objection to the proofs comes too late at the trial.⁴ When the preliminary proofs contained "James," &c. instead of "Joshua," but no objection thereto was then made, it was held waived. Good faith and honest dealing required that the company should call the attention of the assured to defects if it intended to rely upon them.⁵ When the agent of the insurers on receiving the proofs of loss made only a *general* objection thereto pointing out no specific defect, the company cannot thereafter set up a defect therein.⁶ An objection by the company that the proofs are "deficient both in form and substance" is too general.⁷ A

¹ Citing *Goodwin v. Mass. &c. Ins. Co.*, 73 N. Y. 480, and *Prentice v. Knickerbocker Ins. Co.* (N. Y.), 8 Ins. L. J. 708.

² [*Ligon's Adm'rs v. Insurance Co.*, 87 Tenn. 341; *Basch v. Humboldt Mut. Fire & Mar. Ins. Co.*, 35 N. J. L. 429; *Bartlett v. Union Mut. Fire Ins. Co.*, 46 Me. 500, 502; *Firemen's Ins. Co. v. Crandall*, 33 Ala. 9 at 15; *Lycoming v. Dunmore*, 75 Ill. 14 at 16; *Rogers v. Traders' Ins. Co.*, 6 Paige, 583 at 585; *Thierolf v. Universal Fire Ins. Co.*, 110 Pa. St. 37. Company must, on finding proofs objectionable, return them with information of defects. *Universal Fire Ins. Co. v. Block*, 109 Pa. St. 535; *Insurance Co. v. Cusick*, id. 157; *Ben Franklin Fire Ins. Co. v. Flynn*, 98 Pa. St. 628; *Girard Life Ins. &c. Co. v. Mut. Life Ins. Co.*, 97 Pa. St. 15; *Travis v. Continental Ins. Co.*, 32 Mo. App. 198.]

³ [*Fire Ins. Cos. v. Felrath*, 77 Ala. 194.]

⁴ [*Breckinridge v. Amer. Cent. Ins. Co.*, 87 Mo. 62.]

⁵ [*Works v. Farmers' Mut. Fire Ins. Co.*, 57 Me. 281 at 282-283.]

⁶ [*Insurance Co. of N. A. v. Hope*, 58 Ill. 75 at 78].

⁷ [*Myers v. Council Bluffs Ins. Co.*, 72 Iowa, 176.]

delay of several weeks in pointing out objections waives them.¹ Even three or four days may be too long for silence. Immediate notice of defective notice or proofs must be given.² If the company refuse to point out defects and afford proper facilities for the correction of proofs, the imperfections are waived, and the correspondence between the company and the attorney of the assured is competent evidence.³ If proofs designating the policy by a wrong number are received by the company, and it neglects to reply to an inquiry whether the proofs are sufficient, the defect is waived.⁴ If the company knowing all material facts makes no objection to the form or sufficiency of the proofs or to the source whence they came, until after a satisfactory adjustment is reached, all such objections are waived.⁵ A loss occurred February 4. Proofs were sent to the insurers February 18. They were received by the companies, and no objection was made to their sufficiency. During the same month the plaintiffs and the agents of the several companies met and adjusted the loss. Afterward the companies repudiated the adjustment on the ground that the agents had no authority to make it, still making no objection to the proofs. At the trial, however, it was put forth in defence that the proofs were informal and insufficient, but it was held that the above facts warranted the jury in finding a waiver of the imperfection.⁶ Negotiations for adjustment without mentioning defects of proofs, are a strong waiver.⁷ So is subjecting the insured to a private examination.⁸ So, where a company receives proofs of loss without objection, and though twice asked in writing if anything more were required

¹ [People's Fire Ins. Co. v. Pulver, 127 Ill. 246.]

² [Jones v. Mechanics' Ins. Co., 36 N. J. L. 29 at 37; Patterson v. Triumph Ins. Co., 64 Me. 500 at 504; Works v. Farmers' Mut. Fire Ins. Co., 57 Me. 281 at 283; Swan v. Liv., Lond., & G. Ins. Co., 52 Miss. 704; Savage v. Corn Exch. & Co. Ins. Co., 4 Bosw. 1 at 13.]

³ [Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329.]

⁴ [Parks v. Conn. Ins. Co., 26 Mo. App. 511.]

⁵ [Biddeford Sav. Bank v. Dwelling-House Ins. Co., 81 Me. 566.]

⁶ [Butterworth v. Western Ass. Co., 132 Mass. 492.]

⁷ [Little v. Phoenix Ins. Co., 123 Mass. 380 at 387.]

⁸ [Zielke v. London Ass. Co., 64 Wis. 442.]

made no reply.¹ So refusal to return proofs for correction when requested, waives their defects.² As to the definiteness of specification necessary, it has been held that an insurer who rejects the proofs, referring the plaintiff to the condition of the policy which defines what they must contain, and saying that he insists on an exact compliance with that condition, sufficiently specifies the defects in the proofs, and there is no waiver.³

[469 C. **Waiver by Proceeding to investigate Loss and Adjust it, &c.**—Any action of the company based on facts known to them, inducing the insured to believe that the rendition of proofs would be a vain act, is equal to an express waiver, even though the duty to furnish proofs is imposed by statute as well as agreement.⁴ Where on notice of total loss, the secretary went to the place, got a carpenter's estimate for rebuilding, made the insured an offer, and agreed with the agent of another company as to their proportions of the loss, the facts properly went to the jury on the question of waiver of formal proofs.⁵ When an adjuster visits the scene soon after the loss and makes an offer of compromise, and blank proofs are filled up by the assured in presence of the company's officers, the facts properly go to the jury on the question of a waiver of strict proof of loss.⁶ If the company takes notice of a loss and prepares such proofs as it deems necessary to an adjustment, the assured, until notice to the contrary, may assume that further notice and proof are not required.⁷ Refusal to supply blanks for proof of loss on application within the proper time is evidence of waiver to go to the jury.⁸ If the agent, though objecting to the proofs of loss as insufficient, proceeds with an investigation and made a full report,

¹ [Eliot Five Cent Savings Bk. v. Commercial Ass. Co., 142 Mass. 142.]

² [Findersen v. Metropole Fire Ins. Co., 57 Vt. 520.]

³ [Gauche v. Lond. &c. Ins. Co., 10 Fed. Rep. 347; 4 Woods, 102.]

⁴ [Boyd v. Cedar Rapids Ins. Co., 70 Iowa, 325]

⁵ [Susquehanna Mut. Fire Ins. Co. v. Staats, 102 Pa. St. 529; New Orleans Ins. Ass. v. Matthews, 65 Miss. 301.]

⁶ [Argall v. Insurance Co., 84 N. C. 355.]

⁷ [Amer. Cent. Ins. Co. v. Sweetser, 116 Ind. 370.]

⁸ [Dial v. Valley Mut. Life Ass., 29 S. C. 560.]

the question of waiver of the defect in the proofs is for the jury.¹ If an authorized agent waives further proofs and promises to settle, the company is estopped from setting up failure of proofs.² Acts relied on as a waiver of proofs must take place before suit.³ Waiver of proofs rests on the doctrine of estoppel.⁴]

[469 D. **Who may Waive.** — An express waiver by an authorized agent is conclusive.⁵ An adjusting agent may waive proofs of loss by refusing to pay solely on other grounds⁶ or by stating that nothing further will be required.⁷ A general agent, unless his power is restricted to the knowledge of the plaintiff, has power to waive proofs of loss, but he cannot give an oral waiver when the policy requires a written one. And a local agent who has never been held out as possessing any authority except to receive proposals, fix rates, and issue policies, cannot waive the condition as to proofs.⁸ When it appears that the agent had authority to receive applications, take risks, settle rates of premium, and issue policies, this will not tend to show that he was a general agent who could waive preliminary proofs of loss.⁹]

§ 470. **Preliminary Proof; Particular Defects pointed out; Waiver of others.** — So where the insurers place their refusal to pay the loss expressly upon some particular defect in the preliminary proofs, they cannot afterwards object to other defects not then specified;¹⁰ or upon grounds entirely distinct from such defects, making no objection to these, as where the insured gives notice of his loss, and, having lost his policy,

¹ [Enterprise Ins. Co. v. Parisot, 35 Ohio St. 35.]

² [East Tex. Fire Ins. Co. v. Dyches, 56 Tex. 565.]

³ [Smith v. State Ins. Co., 64 Iowa, 716.]

⁴ [Hanna v. Amer. Ins. Co., 36 Mo. App. 538.]

⁵ [Perry v. Mechanics' Mut. Ins. Co., 11 Fed. Rep. 478 (R. I.) 1882.]

⁶ [Ætna Ins. Co. v. Shryer, 85 Ind. 362.]

⁷ [Ind. Ins. Co. v. Capehart, 108 Ind. 270.]

⁸ [Smith v. Niagara Fire Ins. Co., 60 Vt. 682.]

⁹ [Lohnes v. Insurance Co. of N. A., 121 Mass. 439 at 441.]

¹⁰ Phillips v. Prot. Ins. Co., 14 Mo. 220; Rippstein v. St. Louis Ins. Co., 57 Mo. 86; [Fire Ins. Cos. v. Fehrath, 77 Ala. 194. An objection only to the certificate of the magistrate before whom the preliminary proofs were made, is a waiver of any defect in their form. Bailey v. Hope Ins. Co., 56 Me. 474 at 482.]

requests a copy, for which he expresses his willingness to pay, in order that he may furnish the necessary proofs, but receives a reply stating that his claim is rejected for the reason that the policy had been cancelled for non-payment of assessments. Such action on the part of the insurers relieves the insured from the necessity of furnishing any preliminary proof.¹

§ 471. **Preliminary Proof; What is not a Waiver.** — But a general statement of a travelling agent, to the insured, that “the matter would be all right with the company,” will not amount to a waiver of “notice specifying the amount of loss, the manner of it, and other particulars.”² Nor will a reply by the president of the company to the question, What further proof is required? that the policy will show, be a waiver of proof or of defects therein.³ Nor is a reply of the president to an explanation of the reason of failure to give notice, that the company would be disposed to do what is right, amount to such waiver;⁴ nor a mere proposal to arbitrate, the proposition being accompanied by a statement that the party proposing has no power to waive;⁵ nor a letter from the secretary, denying responsibility, stating that the proofs are unsatisfactory, and reserving all objections to a recovery.⁶ And a waiver of notice is not a waiver of the preliminary proof, or of the particular account, when they are treated by the policy as distinct and separate acts.⁷ Where proofs are not forwarded until after the expiration of the time limited, and then liability is denied explicitly on the ground of the neglect to forward proofs in due time, as well as upon other grounds, this is no waiver of the first ground.⁸ Nor is an

¹ *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass.), 265; *Hartford Prot. Ins. Co. v. Harmer*, 22 Ohio, 452; *Noyes v. Washington County Mut. Ins. Co.*, 30 Vt. 659; *Turley v. North Am. Fire Ins. Co.*, 25 Wend. (N. Y.) 374; *Unthank v. Travellers' Ins. Co.*, C. Ct. (Ind.), 4 Bissell, 357.

² *Boyle v. North Carolina Mut. Ins. Co.*, 7 Jones, Law (N. C.), 373.

³ *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1.

⁴ *Smith v. Haverhill Mut. Fire Ins. Co.*, 1 Allen (Mass.), 297.

⁵ *Niagara Dist. Mut. Fire Ins. Co. v. Lewis*, 12 U. C. (C. P.) 15.

⁶ *Citizens' Ins. Co. v. Doll*, 35 Md. 89.

⁷ *Desilver v. State Mut. Ins. Co.*, 38 Pa. St. 130.

⁸ *Blossom v. Lycoming Ins. Co.*, 64 N. Y. 162; *ante*, § 464.

examination of the premises, accompanied by notice to produce the proofs.¹

[Where no word or act has been said or done by the assurer to mislead the assured or throw him off his guard, mere silence is not enough to infer waiver of certificate of loss.² Where the assured claimed payment for the loss of a horse insured against lightning, although he died of disease, a refusal to pay if the horse died from any other cause than lightning is not a waiver, but rather a demand of proofs of loss by the cause insured against.³ That the agent has estimated the damage, and the estimate is accepted by the assured, is no waiver of the proofs.⁴ Nor acceptance of an inventory or other such act by the agent, if at the same time he tells the insured that the stipulated proofs must be furnished.⁵ Evidence of a submission, by the assured and the insurers, of the amount of the loss to arbitrators, is not a waiver of proofs of loss by the latter, so as to let in a trustee process, if the company states in its answer that it has never waived the conditions of the policy.⁶]

§ 472. **Preliminary Proof ; Evidence.** — In *Hincken v. Mutual Benefit Life Insurance Company*,⁷ a question arose as to the amount of evidence necessary to sustain a verdict in favor of the insured upon the allegation of having furnished the required preliminary proof. And it was held that, when at the trial a witness testified that he had delivered the preliminary proofs within the required time, but nothing further appears as to what they were, except that they then were in the possession of the insurers, and that no objection had been made known, this was evidence that the preliminary proofs were in accordance with the requirements of the policy, and sufficient to sustain the verdict.⁸

¹ *Brush v. Insurance Co.*, 6 Phila. 252.

² [*Mueller v. South Side Fire Ins. Co.*, 87 Pa. St. 399 at 405; *Cent. City Ins. Co. v. Oates*, 18 Ins. L. J. 761 (Ala.), May 2, 1889.]

³ [*Cornett v. Phenix Ins. Co.*, 67 Iowa, 388.]

⁴ [*McKean v. Commercial Union Ins. Co.*, 21 N. B. R. 583.]

⁵ [*Life Ass. v. Goode*, 71 Tex. 90.]

⁶ [*Pettingill v. Hinks*, 9 Gray, 169 at 170.]

⁷ 50 N. Y. 657; affirming s. c. 6 Lans. 21.

⁸ See also *Warner v. Peoria Mar. & Fire Ins. Co.*, 14 Wis. 318.

§ 473. **Preliminary Proof; Stipulation as to Waiver.**—And the insurers have been held to have waived their right to insist upon defects in preliminary proof, even though in one of the by-laws it is expressly agreed and declared by the parties that no condition, stipulation, or clause contained in the policy shall be waived, except by writing indorsed on the policy, and all the by-laws are printed as conditions of insurance, and payment of loss is made subject to proof thereof in conformity to the conditions, it appearing that after informal and defective preliminary proofs had been delivered in, the president and secretary of the company examined the premises, and had interviews with the insured before the expiration of the time within which said proofs were to be given, and neither they then, nor the insurers afterwards, made any objection to the form or sufficiency of the preliminary proofs, while there was yet time to remedy defects, but put their refusal to pay on other and distinct grounds. Regarding the case as one of some difficulty, the court say: “How far the provisions, the form of the notice and proofs of loss, after a valid contract has been made and a loss taken place under it, can be regarded as conditions of the contract itself, it is not necessary to determine, nor whether their being classed under the designation of conditions of insurance could change the nature and purpose of the stipulations themselves; for it seems to us that the question is not as to the provisions of the contract, but as to the performance of the provisions. The plaintiff is not seeking to set up a contract from which a material provision has been omitted by the oral consent of the officers of the company. The policy contained the usual provisions as to notice and proofs of loss. Upon the happening of the loss the plaintiff sent to the defendants certain notices and proofs, in pursuance of the requisition of the by-laws upon the subject. If the notices were defective, good faith on the part of the underwriters required them to give notice to the insured. If they failed to do so; if they proceeded to negotiate with the plaintiff without adverting to the defects; if, still further, they put their refusal to pay on other and distinct grounds,—they are, upon familiar princi-

ples of law, estopped to set up and rely upon the defective notices. The law assumes that the notices were correct, and will not listen to the defendant when he seeks to show the contrary.¹ If the defendant relied upon any exemption from the obligations of the policy, or any modification of them by the agents or officers of the company, or any addition, he must show such exemption, modification, or addition by indorsement upon the policy. But the question whether a stipulation as to notice and proofs of loss has been fulfilled, or whether the defendant is in a condition to be heard upon that question, must be tested by the ordinary rules of law. There is a time when objections in matters of form must be taken. If they are not then made, they never can be made. The law does not say the procedure was perfect, but that the question is not open. The adherence to, and liberal application of this principle, are necessary to the maintenance of good faith and fair dealing in judicial proceedings.”² It is worthy of observation that this is the language of a court which has resolutely resisted what appears to be the general tendency to apply the doctrines of waiver and estoppel in favor of the insured, where there has been a clear failure to comply with the express and essential conditions of the contract, but where, nevertheless, it would be inequitable to permit the insurers to avail themselves of such a failure in defence of a claim for damages.

[§ 473 A. **Provision in Policy against Waiver except by Writing, inoperative as to Notice and Proofs.** — A clause to the effect that no act of the company, except an express written declaration, shall waive the requirements in regard to proofs, will not prevent the company from estopping itself, by act *in pais*. So far as the clause is intended to have such effect it is void, for a man cannot contract not to make an agreement that the law allows him to make with the covenantee.³ A

¹ *Vos v. Robinson*, 9 Johns. (N. Y.) 192; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 401; *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.) 257; *Clark v. New England Mut. Fire Ins. Co.*, 6 id. 342. See also *Farmers', &c. Ins. Co. v. Meckes* (Pa.), 12 Repr. 314 (1881). And see *ante*, §§ 140, 363; *post*, § 511.

² *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass.), 265.

³ [*Bowes v. Nat. Life Ins. Co.*, 20 N. B. R. 438.]

provision in the policy that no condition shall be waived or annulled except by indorsement upon it, will not prevent the waiver of proofs of loss if the insurer without objecting to their absence joins in proceedings for adjustment.¹ In spite of such a condition the agent may have authority to orally waive proof of loss, and the question should go to the jury.² Such a provision is held not to refer to stipulations to be performed after loss, such as giving notice and proof.³

§ 474. **Particular Account.** — The particular account of the loss or damage, usually required as a part of the preliminary proof, demands some attention. What and how particular this must be will depend upon the nature of the property insured. If, for instance, it be a dwelling-house, a statement that it was totally destroyed on a given day will be sufficient, if there was in fact a total loss. If, however, there is a partial loss, the extent of the damage should be stated. So in cases of insurance upon merchandise and personal effects generally, where the loss is only partial, the particulars of the nature, quality, and quantity of the effects and of the damage sustained should be given, in order to aid the insurers to form a judgment as to the amount of the loss. It is an account, in its technical sense, of the amount that is required, and not a statement, conjectural or otherwise, of the real or supposed causes of the loss or damage. In other words, the particular account is to be an account, and not an accounting for the loss or damage. If this were not clear upon the words themselves, the usual subsidiary clause making it compulsory upon the insured to produce, in addition to his account, if required, his books of account and other vouchers, would seem to leave no doubt upon the true construction of the provision. Of course it should be stated what was the cause of the loss or damage, so far as to bring it within the risk insured against, as that it was by fire, or by death, or by flood, or by storm, or by some particular accident, as the case

¹ [Carroll v. Girard Fire Ins. Co., 72 Cal. 297.]

² [Lowry v. Lancashire Ins. Co., 32 Hun, 329.]

³ [Wheaton v. North Brit. & Mer. Ins. Co., 76 Cal. 415; Ind. Ins. Co. v. Capehart, 108 Ind. 270.]

may be, but not to the extent of stating how it happened or was occasioned.¹ It is also to be borne in mind that, with reference to notice, particular accounts, and preliminary proofs generally, courts will not require the insured to do more than is clearly required by the terms of the contract; and, whether these be general or particular, will treat them as conditions imposing burdens, to be for that reason construed liberally in favor of those upon whom the burdens are imposed.² And they will give due weight to the fact whether, in the particular case, the insurers have greater or less facilities for obtaining the required information irrespective of the communications of the insured. Thus, in fire insurance, where the insurers or their agents may make personal inspection, they will not require so great particularity as in marine insurance, where not unfrequently the inspection is wholly impracticable.³

§ 475. **Particular Account ; What is required.** — The “particular account of loss or damage” is always liberally construed in favor of the insured, as he must often render it under the disadvantage of the loss of the means for rendering it, nor does it require a statement of the manner in which the loss happened, or of the cause or the occasion of it; nor need it negative excepted causes of loss. The fact of loss within the risk, the subject-matter, and the amount of injury sustained are all that are necessary.⁴ Nor need it state the interest of the insured, unless specially required.⁵ [The particular account of

¹ *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner (U. S. C. Ct.), 434. In *Woodfin v. Asheville Mut. Ins. Co.*, the failure to give the particular account was held to be fatal, although no penalty was by the policy attached to the failure. But this cannot be good law. It is *favoring* forfeitures. See *Taylor v. Ætna Life Ins. Co.*, and *Heath v. Franklin Ins. Co.*, *ante*, § 465, and *Bilbrough v. Metropolis Ins. Co.*, *ante*, § 466.

² *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.) 257; *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner (U. S. C. Ct.), 434; *Lawrence v. Ocean Ins. Co.*, 11 Johns. (N. Y.) 241, 260; *Norton v. Rensselaer & Saratoga Ins. Co.*, 7 Cow. (N. Y.) 645; *Harkins v. Quincy Mut. Fire Ins. Co.*, 16 Gray (Mass.), 591.

³ *Haff v. Mar. Ins. Co.*, 4 Johns. (N. Y.) 132.

⁴ *Catlin v. Springfield Ins. Co.*, 1 Sumner (U. S. C. Ct.), 434.

⁵ *Gilbert v. North American Ins. Co.*, 23 Wend. (N. Y.) 43; *Miller v. Eagle Life Ins. Co.*, 2 E. D. Smith, 268.

loss should be *reasonably specific* under all the circumstances of the case.¹ When the assured claimed a total loss and stated value of property lost, and the nature of his interest therein, not knowing that any part of the same was saved, a by-law calling for a particular account, stating amount lost and amount saved, is complied with. The account is as particular as he can make on the facts known to him.² A mere reference to the books and invoices is not enough, although they have been in the possession of the company since the loss, for it is the duty of the insured to make out the particular statement, enumerating the articles lost and stating their value.³ A general statement of the aggregate value of the property lost, which consisted of divers articles, has been held to be an excuse for an insufficient "particular account," where from the loss of books and accounts, or for other causes, no better or more detailed statement could be made.⁴ Even under such circumstances, this must be more than a mere repetition of the description in the policy, as more or less particulars may always be remembered; and where books and vouchers are lost, a statement that the account is as particular as it is possible to give is liable to impeachment by showing to the contrary.⁵ If there is some particularity, the jury may say if there is enough. If there is none, the court will not allow it to go to the jury.⁶ ["Household furniture, \$3671; groceries, \$233," is not sufficient as a particular statement.⁷] Whether proof is furnished is for the court; whether it is sufficient is

¹ [Erwin v. Springfield Fire & Mar. Ins. Co., 24 Mo. App. 145.]

² [Harkins v. Quincy Mut. Fire Ins. Co., 16 Gray, 591 at 592.]

³ [Gauche v. Lond. &c. Ins. Co., 1 Fed. Rep. 347, 5th Cir. (La.) 1881.]

⁴ McLaughlin v. Washington County Ins. Co., 23 Wend. (N. Y.) 525; Norton v. Rensselaer & Saratoga Ins. Co., 7 Cow. (N. Y.) 645; Bumstead v. Dividend Mut. Ins. Co., 2 Ker. (N. Y.) 81; Hoffman v. Ætna Fire Ins. Co., 1 Robt. (N. Y.) 501; s. c. 32 N. Y. 405; Home Ins. Co. v. Cohen, 20 Grat. (Va.) 312; Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315.

⁵ Banting v. Niagara Ins. Co., 25 U. C. (Q. B.) 431; Beatty v. Lycoming Ins. Co., 66 Pa. St. 9.

⁶ Beatty v. Lycoming County Mut. Ins. Co., 66 Pa. St. 9; Banting v. Niagara, &c. Ins. Co., 25 U. C. (C. B.) 431.

⁷ [Beatty v. Lycoming Co. Mut. Ins. Co., 66 Pa. St. 9 at 17.]

for the jury.¹ And the burden of proof is on the insured to show that he has complied with the requirement.² The account should not fail to give the amount of loss, and to state the fact that it was upon the property insured.³ Every particular fact required should be stated, or an excuse given for not stating it.⁴ If by the terms of the policy it is to be signed, verified, or supported in any particular way, these requirements must be complied with.⁵ A builder's estimate of the cost of rebuilding is not proof of the actual cash value of the property lost;⁶ and a statement that the loss is total is not a certificate of the amount of loss.⁷ But only such particulars of loss and only such books, vouchers, &c., as are reasonably in the power of the insured to furnish can be demanded. If goods, counters, shelving, &c., are paid for in cash, without taking vouchers, he is not bound, at the demand of the insurer, to procure from the persons furnishing them certified statements of their account.⁸ [The condition requiring a particular account of loss, as soon as possible, is waived by the insurer's proceeding at once with the co-operation of the insured to ascertain for himself the full details of the loss.⁹ It is held in Ireland that the furnishing of the particular account within the *exact time* prescribed is not an essential condition precedent to recovery.¹⁰]

§ 476. **Loss; Personal Examination; When Suit may be brought; When Proof made.** — If the loss be made payable at a certain specified time after the rendition of the requisite preliminary proof, no action brought before the lapse of that

¹ *Citizens' Fire Ins. Co. v. Doll*, 35 Md. 89.

² *Mispelhorn v. Farmers' Ins. Co. (Md.)*, 9 Ins. L. J. 411.

³ *Lycoming County Mut. Ins. Co. v. Updegraff*, 40 Pa. St. 311.

⁴ *Markle v. Niagara Ins. Co.*, 28 U. C. (Q. B.) 525; *Battaille v. Merchants' Ins. Co.*, 3 Rob. (La.) 384; *ante*, § 465.

⁵ *Greaves v. Niagara Dist. Mut. Fire Ass. Co.*, 25 U. C. (Q. B.) 127; *Carter v. Niagara Dist. Mut. Fire Ass. Co.*, 19 U. C. (C. P.) 143; *Mulvey v. Gore Dist. Mut. Fire Ins. Co.*, 25 U. C. (Q. B.) 424.

⁶ *Citizens' Ins. Co. v. Doll*, 35 Md. 89.

⁷ *Borden v. Provincial Ins. Co.*, 2 P. & B. (N. B.) 381, 382.

⁸ *Goldsmith v. Gore Dist. Ins. Co.*, 27 U. C. (C. P.) 435.

⁹ [*Ligon's Adm'rs v. Insurance Co.*, 87 Tenn. 341.]

¹⁰ [*Weir v. Northern Counties' &c. Ins. Co. Ir. L. R.*, 4 C. P. 689.]

time can be maintained;¹ and the time is to be reckoned from the delivery of the proof. As the "personal examination" which it is sometimes required the assured shall submit to, is at the option of the insurer, it constitutes no part of the proof, and is without effect in determining the time when suit may be brought. If this were not so, the defendants, by refusing to make any examination, might avoid payment entirely. And the personal examination must be confined to matters pertinent to the loss; nor will a refusal to answer or to produce papers prevent recovery, unless strictly within the stipulations of the policy. And a statement under oath that the property was sold before the loss is open to explanation at the trial.² If new proofs are furnished in the place of defective ones, the time within which the action may be brought is to be reckoned from the presentation of the new proofs;³ but if the policy requires notice of loss, making no mention of the proof or time of payment, the loss will be payable in a reasonable time after notice.⁴ If the policy require that the particular account shall be delivered in, the insured may send it by mail, if there be a general request of the company that all communications and notices be addressed to them, post-paid.⁵ [A stipulation in a fire policy that the insured shall submit to a private examination in case of loss, *if required* by the company, is so far against public policy that a notice that the company *desired* such examination will not be received in evidence.⁶]

§ 477. **Preliminary Proof; Fraud and False Swearing; Payment by Mistake.** — The fraud and false swearing in the preliminary proof, which it is sometimes provided shall prevent

¹ Harris v. Prot. Ins. Co., 1 Wright (Ohio), 548; Winnesheik Ins. Co. v. Schueller, 60 Ill. 465; Insurance Companies v. Weides, 14 Wall. (U. S.) 375. Miller v. Eagle Life & Health Ins. Co., 2 E. D. Smith (N. Y. C. Ct.), apparently to the contrary, is not so upon its facts.

² Germania Fire Ins. Co. v. Curran, 8 Kans. 9; *post*, § 477.

³ Kimball v. Hamilton Ins. Co., 8 Bosw. (N. Y. Superior Ct.) 495.

⁴ Hartford Passenger Assurance Co. (U. S. C. Ct., Southern Dist. Ill.), 2 Ins. L. J. 276.

⁵ Hodgkins v. Mont. County Mut. Ins. Co., 41 N. Y. 620, reversing s. c. 34 Barb. 213.

⁶ [McGraw v. Germania Fire Ins. Co., 54 Mich. 146.]

a recovery, is intentional, and with the purpose of defrauding, and may be with reference to any material matter, — by overvaluing the loss,¹ by undervaluing what is saved, by swearing to the loss of property which was not in existence, and in divers other ways, all open, however, to explanation.² [Where a policy provides for an examination under oath after loss, and that false swearing in this examination shall forfeit the policy, such false swearing as to material facts (the ownership and value of the goods) will avoid the policy, although the *motive* of the insured was not to deceive the insurers, but to cover up false statements previously made to

¹ [A statement of the value of a house burned, in proving the loss, without actual fraud appearing, is but an opinion which, if excessive, is not false swearing. *Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq. 291 at 302. The fact that the assured swore in his proofs and on the trial that his loss was some \$3000 more than the referees found is not even presumptive evidence of fraud or false swearing. *Unger v. People's Fire Ins. Co.*, 4 Daly, 96 at 98. An innocent mistake in swearing to the proofs of loss, made out by the company's agent, and inaccurately stating the names of the owners, but supposed by the insured to be correct, does not prevent a recovery. *Parker v. Amazon Ins. Co.*, 34 Wis. 363 at 371. But if the insured allows his wife to make an inventory of household goods, and signs and swears to it without scrutiny and it contains false statements, he makes the fraud his own. *Mullin v. Vt. Mut. Fire Ins. Co.*, 58 Vt. 113. Where there is a large discrepancy between the statements in the proofs of loss and the findings, the former making the loss three times as much as the latter, and there is no ground to suppose the misstatements arose from mistake, there is fraud as a matter of law, and the jury should not find for the plaintiff in any sum, but should render a verdict for the defendant. *Sternfield v. Park Fire Ins. Co.*, 50 Hun, 262. If the policy is to be void for "wilful misstatement with intent to deceive the company as to the amount of the loss," and the insured in his statement of loss claims \$2000 whereas the property proves to have been worth only \$500, a verdict in his favor will be set aside. *McLeod v. Citizens' Ins. Co.*, 1 Russ. & Geld. (Nova Scotia) 21.]

² *Moadinger v. Mechanics' Mut. Ins. Co.*, 2 Hall (Superior Ct. N. Y.), 490; *Marion v. Great Rep. Ins. Co.*, 35 Mo. 148; *Franklin Fire Ins. Co. v. Updegraff*, 43 Pa. St. 350; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Commercial Ins. Co. v. Huckberger*, 52 Ill. 464; *Beck v. Germania Ins. Co.*, 23 La. Ann. 510; *McMasters v. Ins. Co. of North America*, 55 N. Y. 222; *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325; *Insurance Companies v. Weides*, 14 Wall. (U. S.) 375; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *Clark v. Phoenix Ins. Co.* 36 Cal. 168; *Mason v. Agr. Ins. Co.*, 18 U. C. (C. P.) 19; *Howell v. Hartford Fire Ins. Co.*, C. Ct. (Ill.) 3 Ins. L. J. 649; *Park v. Phoenix Ins. Co.*, 19 U. C. (Q. B.) 110; *ante*, § 116. And fraud as to the value of personal property will avoid the policy as to realty, especially if the provision be that "all fraud shall cause a forfeiture." *Moore v. Virginia, &c. Ins. Co.*, 28 Grat. (Va.) 508.

others.^{1]} Untrue statements as to matters about which no statement is required are no farther material than as they may be used adversely as evidence, and will require explanation at the trial.² [The defence of false swearing in the proofs requires that it be knowingly and wilfully false, with intent to deceive and damage the company.³ The clause in the proofs against misrepresentation or false swearing does not include an honest mistake in omitting an incumbrance which the insured did not believe was a lien on the property.⁴ In spite of the absence of the oath and signature of one of the assured, and a *question* of unreasonable delay, the jury may declare the proofs substantially a sufficient compliance with the conditions of the policy.^{5]} A claim honestly made is not, under the condition against fraud, invalidated on account of error, or even some degree of exaggeration or overestimate; but if the insured, with reference to the quantity or the value of the goods insured, makes a claim which he knows to be false and unjust, and which may defraud, then he cannot recover anything.⁶ But a mere wilful false statement which cannot defraud will not prevent recovery.⁷ The failure, however, to mention circumstances known to the plaintiff, tending to show that the fire was purposely set, may be fraudulent.⁸ So is a known over-valuation, made with a purpose to induce a speedy settlement and to prevent controversy, about the claim for the full amount insured.⁹ The mere fact that the amount of loss, as found by the jury, is less than that stated by the insured in

¹ [Clafin v. Commonwealth Ins. Co., 110 U. S. 81, 96.]

² Ross v. Com. Un. Ass. Co., 26 U. C. (Q. B.) 552; Rice v. Prov. Ins. Co., 7 U. C. (C. P.) 548; Day v. Mut. Benefit Ins. Co., 5 Big. Life & Acc. Ins. Cas. 53; Crowley v. Agr. Ins. Co., 21 U. C. (C. P.) 567; Connecticut Mut. Ins. Co. v. Siegel, 9 Bush (Ky.), 157.

³ [Erman v. Sun Mut. Ins. Co., 35 La. Ann. 1095; Dual v. Firemen's Ins. Co., 35 La. Ann. 98.]

⁴ [Thierolf v. Universal Fire Ins. Co., 110 Pa. St. 37.]

⁵ [Marthinson v. North Brit. & Mer. Ins. Co., 64 Mich. 372.]

⁶ Per Cockburn, C. J., *Visi Prius*, Chapman v. Pole, 22 L. T. N. S. 307; Sibley v. St. Paul, &c. Ins. Co., C. Ct. (Ill.), 8 Ins. L. J. 461; Dogge v. N. W. Ins. Co., 49 Wis. 501.

⁷ Shaw v. Scottish Ins. Co., C. Ct. (Me.), 1 Fed. Rep. 761.

⁸ Smith v. Queen Ins. Co., 1 Hannay (N. B.), 311.

⁹ Sleeper v. New Hampshire Ins. Co. (N. H.), 5 Ins. L. J. 539.

his preliminary proof, is not sufficient to sustain the defence of false swearing,¹ even though the discrepancy be so considerable as to amount to two-fifths;² though such a discrepancy would be evidence bearing upon such issue, which the insured would be called upon to explain.³ But in *Levy v. Baillie*,⁴ a rule *nisi* for a new trial was made absolute where the claim sworn to was £1085, and the amount found by the jury was £500, on the ground that that was in effect a verdict for the defendant under the condition. And if the sworn statement discloses a ground of defence for the insurer, he may avail himself of it, and the insurer will be bound by his statement at the trial, unless an amended statement is furnished to the insurers before that time,⁵ — in which case, the fact constituting a defence may be shown to have been so stated by mistake.⁶ In fact, in this case the explanation was admitted without a previously amended statement, the misstatement having been voluntary. And if payment of the loss be obtained by means of fraudulent proofs, the money may be recovered back in an action for the deceit. In such an action it was ruled that the defendants might be held liable, even though the plaintiffs did not rely exclusively upon their statements, but were partly induced by other statements or proofs to make the payment. It is sufficient, upon this point, “if the plaintiffs so far relied on these statements (of the defendants) that they would not have paid the money, had it not been for these statements.” If the representations of the

¹ *Franklin Ins. Co. v. Culver*, 6 Ind. 137.

² *Moore v. Prot. Ins. Co.*, 29 Me. 97; *Cann v. Imperial, &c. Ins. Co.*, 1 R. & C. (Nova Scotia) 240, 244.

³ *Hoffman v. West. Mar. Fire Ins. Co.*, 1 La. Ann. 216; *Marchesseau v. Merchants' Ins. Co.*, 1 Rob. (La.) 438. See also *post*, § 584.

⁴ 7 Bing. 349. The doctrine of this case, however, is extreme, and has been denied to be sound in a recent well-considered case. *Gerhauser v. North Brit. & Mer. Ins. Co.*, 6 Nev. 15. And see *ante*, § 443. But where the claim for loss was \$2000, and the verdict for \$500, the verdict was set aside in *McLeod v. Citizens' Ins. Co.*, 3 R. & C. (Nova Scotia) 156. As to over-valuation of insurable interest, see *ante* §§ 373–376.

⁵ *Campbell v. Charter Oak Fire Ins. Co.*, 10 Allen (Mass.), 213; *Irving v. Excelsior Fire Ins. Co.*, 1 Bosw. (N. Y. Superior Ct.) 507.

⁶ *Hayes v. Union Ins. Co.*, U. C. (Q. B.), 9 Ins. L. J. 80.

defendants were calculated and intended to induce the plaintiffs to alter their condition by parting with their money, and had that effect, it would be immaterial that other representations and influences were also brought to bear, which may have had a tendency towards the same general results.¹ So if a purchaser of a policy is induced by representations that the loss will be paid, the insurers will be estopped from setting up against the purchaser a defence which might have been made to the note in the hands of the beneficiary named in the policy.²

¹ *Hartford Live Stock Ins. Co. v. Mathews and Another*, 102 Mass. 221; *Northwestern Life Ins. Co. v. Elliott*, C. Ct. (Or.), 10 Ins. L. J. 333.

² *France v. Ætna Life Ins. Co.* (C. C. U. S., East. Dist. Pa.), 2 Ins. L. J. 657.

CHAPTER XXVI.

LIMITATION OF SUIT AS TO TIME AND PLACE.

ANALYSIS.

- § 478 A. Time.
- A condition that suit must be brought within a certain time is valid even against minor beneficiaries (unless unreasonable, § 482).
It controls the general statute of limitations.
Limitation in by-law.
Such conditions do not apply to a suit to recover premiums.
- A condition that no suit shall be brought until defendant does some act is void (also § 479).
- § 479. The period begins to run from the time the loss becomes due and payable, and the right of action accrues. There is no right of action until the sixty days or ninety days after proof allowed the company for payment; wherefore the limitation does not begin to run until that time has expired, although the language of the policy is emphatic that it shall run from the time of the fire, § 479.
Contra, § 479, and note.
- Canada statutes, § 479.
If sixty days are given for payment they run from the time of proof, § 479.
- If the last day is Sunday, suit on following day sufficient.
- § 480. Limitation of the issuing of execution against the company is valid.
- § 481. Reinsurance under a policy containing time limitations.
- § 482. A new promise will not revive a cause of action once dead under a clause of limitation.
- § 483. Non-suit or arrest of judgment in suit brought within time will not permit a new suit after time, nor will a suit in a court without jurisdiction stop the running of the period. But an amendment in the name of the defendant may be made after the time has expired, or a new party may be added.
- §§ 484-488. Excuse for failing to sue within the time.
- Fault of insurer is an excuse, §§ 484, 488.
- Negotiations in bad faith or other action lulling the insured into security, and leading him to suppose as a prudent man that suit is unnecessary, § 488.
- Otherwise if the negotiations are in good faith, or cease before the limitation expires, § 485.
- Refusal to pay does not waive the outer limitation of suit, but does waive the sixty or ninety days allowed the company for payment, and suit may be brought at once, § 488.

Demanding proofs, or otherwise recognizing the policy after the period has expired, is a waiver, § 488.

Clause requiring *writing* for a waiver, § 488.

Payment to mortgagee does not waive the limit as to the mortgagor, § 488.

Arrest for arson not at instance of company no excuse, § 488.

Intervening war may excuse, § 486.

Other conditions inconsistent with the time limit, § 487.

§§ 490, 491. Place. Limitation as to venue.

§ 478. **Limitation as to Time ; From Loss.** — A condition in a policy of fire insurance, that no action against the insurers for the recovery of any claim upon the policy shall be sustained, unless commenced within a certain period after the loss shall have occurred, and that the lapse of this period shall be conclusive evidence against the validity of any claim asserted, if an action for its enforcement be subsequently commenced, is valid,¹ and is generally held not to be in contravention of the policy of statutes of limitation. It stands upon the same grounds as other conditions precedent.

There is no principle of common law forbidding such a condition. Originally there was no limitation to actions. The first statute of limitations, which has been substantially followed, provided that suits in certain cases should be brought within six years, and not afterwards. But there is nothing in the act which forbids a limitation short of this period, by agreement of parties. It only prohibits the suit after six years. There can be no doubt that, prior to the statute, it would have been competent for the parties, by a clause in their contract, to limit the time within which suit might be brought. There is nothing in the act, necessarily

¹ [Moore v. State Ins. Co., 72 Iowa, 414; Phoenix Ins. Co. v. Lebcher, 20 Brad. 450; Ghio v. Western Ass. Co., 65 Miss. 532; Universal Ins. Co. v. Weiss, 106 Pa. St. 20; Farmers' Mutual Fire Ins. Co. v. Barr, 94 Pa. St. 345; Tasker v. Kenton Ins. Co., 58 N. H. 469 at 469; Davidson v. Phoenix Ins. Co., 4 Sawyer (U. S.), 594 at 596; Merchants' Ins. Co. v. La Croix, 35 Texas, 249 at 261; Higgins v. Windsor Co. Mut. Fire Ins. Co., 54 Vt. 270. The clause "all claims are barred unless prosecuted within one year, &c.," is not doubtful nor ambiguous, and means precisely its literal interpretation. Carraway v. Merchants' Mut. Ins. Co., 26 La. Ann. 298 at 299. A limitation of suit in the policy to one year after loss controls the general statute of limitation, and is good even against minor beneficiaries. Suggs v. Insurance Co., 71 Tex. 579; O'Laughlin v. Union Cent. Life Ins. Co., 11 Fed. Rep. 280; 3 McCrary, 543 (Mo.) 1882.]

or by fair construction, taking away the right. And the adoption of such a condition is based upon grounds of prudence and policy which must challenge the general approval. Insurance companies are always liable to be imposed upon by fraud. It is often very difficult to detect the fraud, and to obtain evidence to substantiate it in a court of justice; and the greater the lapse of time the greater the difficulty. It is therefore a wise and provident precaution to take, — one which the law ought, if possible, to uphold, — to limit, by the terms of their policies, the time within which actions shall be brought, as a necessary protection to themselves against fraud; and they have the same right to introduce such a stipulation as to introduce any other.¹ Even language less explicit, as that the insured may bring his action within a limited time, has been held to bar an action brought after that time;² and so has a condition that suit should be brought at the next term of court after refusal to pay on penalty of

¹ *Ketchum v. Prot. Ins. Co.*, 1 Allen (New Brunswick), 136; *Amesbury et al. v. Bowditch Mut. Fire Ins. Co.*, 6 Gray (Mass.), 596; *Glass v. Walker*, 66 Mo. 32; 6 Repr. 148; *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. (U. S.) 386; *Cray v. Hartford Ins. Co.*, 1 Blatch. (U. S. C. Ct.) 280; *Brown v. Roger Williams Ins. Co.*, 7 R. I. 301; s. c. 5 id. 304; *Wilson v. Ætna Ins. Co.*, 27 Vt. 99; *Williams et al. v. Vermont Mut. Ins. Co.*, 20 id. 222; *Peoria Ins. Co. v. Whitehill*, 25 Ill. 466; *North Western Ins. Co. v. Phoenix Oil & Candle Co.*, 31 Pa. St. 449; *Brown et ux. v. Savannah Mut. Ins. Co.*, 24 Ga. 97; *Portage County Mut. Ins. Co. v. West*, 6 Ohio St. 599; *Carter v. Humbolt Fire Ins. Co.*, 12 Iowa, 287; *Stout v. City Fire Ins. Co.*, id. 371; *Ripley v. Ætna Ins. Co.*, 29 Barb. (N. Y.) 552; *Fullam v. New York Union Ins. Co.*, 7 Gray (Mass.), 61. The case in the Supreme Court of Indiana, *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443, rested upon *French v. Lafayette Ins. Co.*, 5 McLean, 461, which has been overruled by the case cited above from 7 Wallace (U. S. Sup. Ct.), 386. See also *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136; *Brown v. Hartford Ins. Co.*, 5 R. I. 394; *Hickey v. Anchor Ass. Co.*, 18 U. C. (Q. B.) 433; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; *Roach v. New York & Erie Ins. Co.*, 30 N. Y. 546; *Woodbury Sav. Bank v. Charter Oak Ins. Co.*, 31 Conn. 518. The French law and that of Lower Canada hold such a limitation in derogation of the general statute of limitations, and such is the language of some of our courts. *Comp. de l'Union c. Foure, Dalloz, Jur. Gén.*, 1850, 2, 40; *Wilson v. State Fire Ins. Co.*, 7 L. C. Jur. 223; *Mayor v. Hamilton Ins. Co.*, 39 N. Y. 46; *Westchester Fire Ins. Co. v. Dodge* (Mich.), 9 Ins. L. J. 909. [The creditor may stipulate to shorten the time of prescription limited by law, but an agreement to extend that time is not valid. *Allen v. Merch. Mut. Ins. Co.*, 33 L. C. Jur. 314, 316.]

² *Portage County Mut. Fire Ins. Co. v. West et al.*, 6 Ohio, n. s. 599.

forfeiture.¹ And the limitation, being part of the contract, applies whatever may be the form of the suit.² [Where a fire broke out in the evening of August 23, 1884, and extended into the 24th, a suit begun on Feb. 24, 1885, was held barred, by the six months' limitation.³ When a section of an act incorporating insurance companies provides that stockholders may bring suits if their loss claims are not paid within two months thereafter, and a clause of a policy issued to one not a stockholder states that "payment of losses shall be made in sixty days after proof," the latter waives the former even if it might otherwise apply.⁴ If a by-law is relied on as establishing a period of limitation for suit, it must be shown that it was adopted before the contract of insurance in issue was made.⁵ A limit of a year in which to bring action "for the recovery of any claim by virtue of this policy" does not apply to a suit to recover back premiums paid on a policy void *ab initio*, such action is not based on the policy but on the absence of any legal policy.⁶ A condition that no action should be brought until the defendant did something dependent on his own will, is void as against public policy.⁷ Where a corporation is chartered to insure the lives of members for beneficiaries named, the liability of the company is a statutory one, and the period of limitation applicable to it is twenty years.⁸]

§ 479. **Limitation; From Time when Loss becomes due; From Proof.** — In some cases it is provided that a suit is not to be brought until the expiration of a certain time after the loss becomes due; and it has been held that where a loss, subject to such provision, was allowed, payable in sixty days, suit brought therefor two months after the allowance was properly brought. The demand is due from and after the determination of the amount or allowance. It is payable at

¹ Keim v. Home Ins. Co., 42 Mo. 38.

² Fullam v. New York Union Ins. Co., 7 Gray (Mass.), 61. And see *post*, § 480.

³ [Allemania Ins. Co. v. Little, 20 Brad. 431.]

⁴ [Howard v. Franklin Mar. & Fire Ins. Co., 9 How. Pr. 45 at 47.]

⁵ [Cox v. Fire Assurance Ass., 48 N. J. 53.]

⁶ [Waller v. Northern Ass. Co., 64 Iowa, 101.]

⁷ [Bowes v. Natl. Ins. Co., 20 N. B. R. 438.]

⁸ [Ga. Masonic Ins. Co. v. Davis, 63 Ga. 471.]

the expiration of the time limited. That it is not due till the expiration of the time limited for the payment is not the correct interpretation; after the allowance it is *debitum in præsentì, solvendum in futuro*.¹ If the policy provides that suit shall be brought within a certain time after the "loss or damage shall occur and become due," and further provides that the payment of losses shall be made in ninety days after proofs shall be received at the office of the company, the proofs having been furnished with due diligence, the time limited for bringing suit will begin to run at the expiration of the ninety days,² and that notwithstanding the policy contains a general limitation of suits to one year from the time of the loss. The time when a "claim shall occur" under such policy is when proper proofs have been made, and may be widely different from the "time of loss."³ Though the policy provide that suit shall be brought within a certain time after the loss shall occur, this is held to mean after the cause of action accrues, if by the same policy it is provided that no suit shall be brought until after an award has been entertained. And generally the limitation will be construed to run from the time when the loss becomes *due and payable*, rather than from the time when the loss actually occurs.⁴ If

¹ *Utica Ins. Co. v. American Mut. Ins. Co.*, 16 Barb. 171; *Chandler v. St. Paul Fire & Mar. Ins. Co.*, 21 Minn. 85.

² *Longhurst v. Conway Fire Ins. Co.*, U. S. D. Ct. (Iowa), 1861, cited in *Clarke's Digest of Fire Insurance Cases*.

³ *Chandler v. St. Paul Fire & Mar. Ins. Co.*, 21 Minn. 85.

⁴ *Levy v. Virginia Fire Ins. Co.*, C. Ct. (La.), 9 Ins. L. J. 113; *Hay v. Star Fire Ins. Co.*, 13 Hun (N. Y.), 496; *post*, § 487; *Barber v. Fire, &c. Ins. Co.*, 16 W. Va. 658. [Although a policy provides that action must be brought within twelve months from the time the loss "occurs," yet it will be construed to mean twelve months from the time the loss is due and payable, sixty days after proof in this case. *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315; disapproving *Johnson v. H. Ins. Co.*, 91 Ill. 93; 33 Am. Rep. 47; *Fullam v. N. Y. U. Ins. Co.* 7 Gray, 61. A limitation of a year or six months, &c., *after loss* does not begin to run until the sixty days after proof allowed for payment. *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507; *Miller v. Hartford Fire Ins. Co.*, 70 Iowa, 704; *Mix v. Andes Ins. Co.*, 9 Hun (N. Y.), 397 at 400; *German Amer. Ins. Co. v. Hocking*, 115 Pa. St. 398; *Commercial Union Ass. Co. v. Hocking*, 115 Pa. St. 407; *Mayor of N. Y. v. Hamilton Ins. Co.*, 89 N. Y. 45 at 48. There are however authorities to the contrary. It being held that if the action is to be brought within six months *after the loss*, it will not be sufficient to bring it within six months after

no time is specified when loss shall become payable, it will be payable within a reasonable time.¹ [Where the loss is not payable until sixty days after proof of loss, and no action can be begun until an award has fixed the amount of damages, nor after six months from the loss, the limitation of suit does not begin to run from loss, but from the time the right of action accrues; as otherwise it might run out and the right of action be barred before it accrued.² A suit within the time which the contract gives the company to settle, is premature unless the company has repudiated its liability.³ In Iowa, by statute an action cannot be begun until ninety days after notice of loss.⁴ The thirty days allowed the company for payment by the Canada statute cannot be *extended* by the contract to sixty days.⁵ The policies of a mutual company, however, are not subject to the Uniform Conditions Act, R. S. O., c. 162, and the agreement may give the company three months after proofs in which to pay the claim.⁶] And where sixty days' delay in payment of loss is given, it will, unless otherwise specified, run from the time when proofs are furnished.⁷ Where the loss was not to be payable till an inventory was sent and an appraisal permitted by the insured, and nothing was done about an appraisal by either party, it was held that a recovery might be had without an appraisal, as that was a matter in which the insurers were to move, and he only to permit. It

the expiration of the sixty days allowed the company for payment of the claim. *Blair v. Sovereign Fire Ins. Co.*, 19 N. S. R. 372; *McDonald, C. J.*, dis. If the policy provides that suit must be commenced within twelve months after the fire, the time begins to run *at the fire*, and not from the expiration of the sixty days given the company in which to make payment after proofs of loss. *King v. Watertown Fire Ins. Co.*, 47 Hun, 1; *Chambers v. Atlas Ins. Co.*, 51 Conn. 17; *Bradley v. Phoenix Ins. Co.*, 28 Mo. App. 7.]

¹ *Tooley v. Railway Passenger Ass. Co.*, C. Ct. (Ill.), 2 Ins. L. J. 275.

² [*Friezen v. Allemania Fire Ins. Co.*, 30 Fed. Rep. 352 (Wis.), 1887; *Vette v. Clinton Fire Ins. Co.*, id. 668 (Mo.).]

³ [*Donahue v. Windsor Co. Mut. Fire Ins. Co.*, 56 Vt. 374.]

⁴ [*Quinn v. Capitol Ins. Co.*, 71 Iowa, 615; *Vore v. Hawkeye Ins. Co.*, 76 Iowa, 548; *Laws of 1880*, c. 211, § 3.]

⁵ [*City of Lond. Fire Ins. Co. v. Smith*, 15 Can. S. C. R. 69.]

⁶ [*Mut. Fire Ins. Co. v. Frey*, 5 Can. Supr. Ct. 82.]

⁷ *Hatton v. Provincial Ins. Co.*, 7 U. C. (C. P.) 555; *Insurance Co. of North America v. McDowell*, 50 Ill. 120.

was their neglect, and not his.¹ But where insurers against damage by hail to crops were not to be liable for any injury less than one twenty-fifth of the value of the crops, and it was also provided that appraisers should be appointed to ascertain the damage at the expense of the insured, if the loss was less than one twenty-fifth, he to deposit, on demand of the agent, "the amount of costs arising from the assessment," before the accomplishment of the assessment, it was held that the insurers were entitled to demand the deposit before making the appraisal, without reference to the actual damage done.² [It is no defence to a plea of the agreed limitation to reply that the suit was brought within twelve months after the *adjustment*.³ If the last day of the period comes on Sunday the insured may sue on the following day.⁴]

§ 480. **Limitation ; Execution.** — And a like provision, with reference to the levy of an execution for similar reasons, is also valid. And the provision of the charter of a mutual fire insurance company, that no execution shall issue upon any judgment obtained against them until three months after the rendition thereof, will be enforced, though the judgment upon which the execution is sought to be enforced be founded upon a foreign judgment rendered long before. The provision of the charter becomes a constituent part of the contract between the parties, and the analogy between a stipulation not to bring suit within or after the expiration of a certain period, and a stipulation not to levy execution, is sufficient to warrant the court in ordering a stay of execution.⁵

§ 481. **Limitation ; Reinsurance.** — Reinsurance, under a policy which stipulates that suit shall be brought within a limited time after any loss or damage shall occur, expires at the expiration of the time limited after the loss of the property by the peril insured against, and not after the payment by the reinsured of the loss. The payment by him, though

¹ *Commercial Ins. Co. v. Robinson*, 64 Ill. 265.

² *Mutual Hail Ins. Co. v. Wilde*, 8 Neb. 427 ; 8 Ins. L. J. 765.

³ [*Dickie v. Western Ass. Co.*, 21 N. B. R. 544.]

⁴ [*Owen v. Howard Ins. Co.*, 87 Ky. 571.]

⁵ *Judkins v. Union Mut. Fire Ins. Co.*, 39 N. H. 172.

in one sense a loss to him, is not the loss or damage referred to in the policy of reinsurance.¹

§ 482. **Limitation; Avoidance; New Promise.** — And a new promise or acknowledgment will not revive such a cause of action.² If the prescribed time be suffered to elapse without suit, there remains no longer a legal liability in any form. There is no indebtedness which, though by the operation of the statute incapable of being enforced by suit, may nevertheless be reanimated and invested with that quality by an acknowledgment or new promise. The contract is of a peculiar description, resembling a wagering contract, in which the insurers, for a small premium, undertake to indemnify the party who suffers the loss. The amount for which they may become responsible greatly exceeds the premium paid; and the liability depends upon a contingency over which neither party has any control. For whatever the insurers may eventually have to pay, they become liable by positive stipulation rather than upon any principle of natural justice growing out of an adequate consideration received. So far as this liability exceeds the premium paid, it more nearly resembles a penalty than a simple debt, and thus would more naturally fall into the class of cases in which statutes, prescribing a time within which suits shall be brought, are construed as limitations upon the liability rather than mere denials of a remedy.³ It was intimated in *Brown et ux. v. Savannah Mutual Insurance Company*⁴ that such a limitation might not be upheld if the period within which suit must be brought be so unreasonable as to raise a presumption of imposition or undue advantage in some way.

§ 483. **Failure of Suit Brought within Time.** — Nor can such suit, brought after the expiration of the time limited, although a prior suit commenced within the limited period may have been nonsuited, or judgment thereon arrested, be maintained. The condition is without exception, and the exceptions of statutes of

¹ *Prov. Ins. Co. v. Ætna Ins. Co.*, 16 U. C. (Q. B.) 135.

² [But see *Fire & Mar. Ins. Co. v. Chestnut*, 50 Ill. 111.]

³ *Williams et al. v. Vermont Mut. Ins. Co.*, 20 Vt. 222.

⁴ 24 Ga. 97. And see Angell on Limitations (5th ed.), p. 16, note.

limitations cannot be imported into it by the court.¹ But where a suit was commenced within the time limited, but by mistake the name of the wrong company was inserted in the body of the summons, the defendant having voluntarily appeared to move to dismiss, the plaintiff was allowed to amend by inserting the name of the defendant, and proceed with his suit.² (Yet if in such a case the plaintiff discontinues a suit in equity afterwards, and after the time when he might have brought a new suit, the real object of which is to obviate the delay, will not be sustained.³) [So an amendment adding a plaintiff may be made after the period for action has expired.⁴ If suit is begun within the period a mortgagee or other person entitled to part of the proceeds may *intervene* in the suit *after* the period.⁵ When suits on a policy must be prosecuted within one year after loss, the bringing of an action within that time, the transfer of it to another court and finally, while it is still pending, the change of suit because of wrong parties, is sufficient, provided good faith exists, although the last act was done after the year was up and the other suit discontinued.⁶ But beginning a suit in a court without jurisdiction within the period will not stop the running of the limitation.⁷]

§ 484. **Limitation; Excuse; Absence of Defendant.**— Perhaps, however, the doctrine of the last case should be taken with the qualification that the failure of the first suit is not imputable to the fault of the insurers. Such seems to have been the view taken in a case in Michigan, where suit was brought thirteen days before the expiration of the time limited. The writ was immediately placed in the hands of the officer, who made return that he could not find the defendant. Thereupon the next day, which was two days after the ex-

¹ *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. (U. S.) 386; *Brown v. Roger Williams Ins. Co.*, 7 R. I. 301; *Wilson v. Ætna Ins. Co. of New York*, 27 Vt. 99.

² *Burton v. Buckeye Ins. Co.*, 26 Ohio St. 467.

³ *Arthur v. Homestead Ins. Co.*, 78 N. Y. 462.

⁴ [*Doull v. Western Ass. Co.*, 6 Russ. & Geld. (Nova Scotia) 478.]

⁵ [*Stevens v. Citizens' Ins. Co.*, 69 Iowa, 658.]

⁶ [*Madison Ins. Co. v. Fellowes*, 1 Disney (Ohio), 217 at 221.]

⁷ [*Keystone Mut. Ben. Ass. v. Norris*, 115 Pa. St. 446.]

piration of the time limited, another summons was issued, with which the defendant was served. The limitation in this case was in the contract, and not in the charter of the company. The court, without stopping to consider whether the issue of the second summons was, or was not, a continuation of the suit, sustained the action. It appeared to them to have been the fault of the defendant—the absence of their agent—that the first summons was not served, and the action commenced within the limited period; and this was sufficient to defeat the limitation, or extend it till the service was made under the second summons, which was issued immediately on the return of the first. While a limitation by statute is arbitrary and peremptory, admitting of no excuse beyond the period fixed, a limitation by contract must, upon the principles governing contracts, be more flexible in its nature, and liable to be defeated or extended by any act of the defendant which prevents the plaintiff from bringing his action within the prescribed period. And the fundamental idea, the tacit condition upon which such a limitation must rest, and without which it could not be tolerated for a moment, is, that the defendant shall be accessible to the service of process by which suit may be commenced against him, if not for the whole period, at least for a sufficient time immediately preceding its close to enable the plaintiff to commence suit by the service of process in the ordinary legal mode. If this be not so, then it follows that the defendant could take advantage of his own wrong, and, by absenting himself entirely, defeat the plaintiff's right of action.¹ But this importation into the contract of the exception of absence, after the analogy of statutes of limitations, has not elsewhere met with approbation.² In the last-cited case, however, no attempt had been made to bring the action within the limited period, for the alleged reason that the action could not have been maintained unless the defendant had voluntarily appeared, and there was no means of compelling an appearance; and perhaps the observation of the court, that nevertheless

¹ Peoria Mar. & Fire Ins. Co. v. Hall, 12 Mich. 202.

² Ketchum v. Prot. Ins. Co., 1 Allen (New Brunswick), 136.

the plaintiff might have sued out process within the limited period, is indicative that, had this been done, the result would have been different.

§ 485. **Limitation ; Excuse ; Pending Negotiations.** — Nor will the operation of such a limitation be suspended or prevented by negotiations for a settlement, as by a reference pending between the parties, if there be no agreement for delay, and the defendant has done nothing to mislead the plaintiff.¹ [Negotiations which terminate two months before the period of limitation is up do not excuse delay beyond such period.²]

§ 486. **Limitation ; Excuse ; Effect of War.** — Where by the terms of the policy suit is to be brought within twelve months after loss, and to a suit brought after that time the lapse of time shall be deemed conclusive evidence against the validity of the claim, and insured was prevented by the intervention of war from bringing his suit within twelve months after the loss, the court held that war having rendered compliance with this condition impossible, the presumption from the lapse of time was destroyed, and did not revive, and that the insured might bring his suit at any period within the statute of limitations, without regard to the fact whether twelve months of peace within which he might have brought his suit had elapsed.³

§ 487. **Limitation ; Excuse ; Inconsistent Conditions.** — And where the other conditions are such that a reasonable compliance with them is inconsistent with a compliance with the condition requiring suit to be brought within a specified time, the latter will not be allowed to defeat a recovery. Thus, where suit is to be brought within six months from the time of the loss, and the loss is not payable until sixty days after the adjustment, and the parties, in good faith and without objection, are occupied so long in adjusting the loss that sixty

¹ *Gooden v. Amoskeag Fire Ins. Co.*, 20 N. H. 73.

² [*Blanks v. Insurance Co.*, 36 La. Ann. 599.]

³ *Semmes v. City Fire Ins. Co. of Hartford*, 13 Wall. (U. S.) 158, 159, reversing s. c. 6 Blatchf. (C. Ct. U. S.) 445; *Lynchburgh Hose Fire Ins. Co. v. Knox*, ante, § 39, note; *Hillyard v. Mut. Ben. Life Ins. Co.*, 6 Vroom (N. J.), 415; [*Phoenix Ins. Co. v. Underwood*, 12 Heisk. (Tenn.), 424 at 427.] And see ante, § 350.

days from the date of the adjustment does not expire within the six months, a suit brought at the expiration of sixty days will be sustained.¹ So where the insurable interest was a mechanic's lien, the value of which could only be determined by a judgment of court upon suit, which was brought immediately upon the occurrence of the loss, but did not come to judgment till after the expiration of the time limited for bringing suit for the loss, it being also stipulated that proof of the value of the loss must be made before it could be demanded, it was held that the limitation of the suit was inoperative.² The insurers, in issuing a policy upon a mechanic's lien, must be presumed to issue it subject to the unavoidable delay in the judicial ascertainment of the value of the interest if a loss should occur. If, with reasonable diligence, that value cannot be legally ascertained in time to bring an action on the policy within the limited period, it follows either that there is a dishonest purpose on the part of the company in inserting such a condition, or else they intend in such case to waive it, or treat it as wholly inapplicable and nugatory.³ Nor will a collateral suit brought after the expiration of the limited time in aid of a suit at law brought within the limited time, be barred ; as where a bill in equity is brought to reform a policy. Had there been no suit at law pending, a bill in equity for relief would have been barred.⁴ And if the insurers refuse to issue a policy, and a bill in equity to enforce the agreement to issue it be filed, they cannot avail themselves of such a limitation as applicable to the bill in equity.⁵

§ 488. **Limitation ; Waiver ; Refusal to Pay ; Adjustment.** — But this condition, like all others intended for the benefit of the insurers, may be waived by them ; and as the condition is a harsh one in its bearing on the insured, and works a for-

¹ *Mayor, &c. of New York v. Hamilton Fire Ins. Co.*, 10 Bosw. (N. Y.) 587 ; *ante*, § 479 ; *Badger v. Phoenix Ins. Co.* (Ohio), 9 Ins. L. J. 627 ; *Chandler v. St. Paul, &c. Ins. Co.*, 21 Minn. 85. But see *Pennell v. Lamar Fire Ins. Co.*, 73 Ill. 303.

² *Stout v. City Fire Ins. Co. of New Haven*, 12 Iowa, 371.

³ *Longhurst v. Star Ins. Co.*, 19 Iowa, 364. And see *post*, § 503.

⁴ *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 518.

⁵ *Penley v. Beacon Ass. Co.*, 7 Grant (Canada), 130.

feiture when upheld, the courts will not require very stringent evidence in order to defeat its application. A positive act of the company intended to induce postponement is not necessary. And where the evidence upon this point is conflicting, waiver is a question of fact for the jury.¹ Mere silence, however, is no waiver,² though it may be evidence thereof to go to a jury;³ especially if it has a tendency to mislead;⁴ nor are loose conversations about a settlement;⁵ nor is a peremptory refusal to pay, though on the ground that actions have been brought by other parties, and nothing will be done towards payment while such actions are pending, a waiver of the right to insist upon the limitation. The insured is not misled thereby, nor is he expressly or impliedly requested to delay by the insurer.⁶ [A communication from the company five months before the limitation is over, that it will not pay, is not waiver of the right to insist on the limitation.⁷] Nor, as we have just seen,⁸ is the mere pendency of negotiations in good faith. If, however, they are not prosecuted in good faith, or are made the occasion of delay,—a result to which the insurers mainly contribute by holding out hopes of an amicable adjustment whereby the insured is led to feel a false security, this is a waiver.⁹ So, if the delay for any cause be attributable to the insurers and the insured be not in

¹ *Ripley v. Ætna Ins. Co.*, 29 Barb. (N. Y.) 552; *Coursin v. Penn Ins. Co.*, 46 Pa. St. 323; *Ketchum v. Prot. Ins. Co.*, 1 Allen (N. B.), 136; *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25; *Graves v. Washington Mar. Ins. Co.*, 12 Allen (Mass.), 391.

² *Ante*, § 464; *Schrøder v. Keystone Ins. Co.*, 2 Phila. 286; s. c. 14 Leg. Int. 164.

³ *Ripley v. Ætna Ins. Co.*, 29 Barb. (N. Y.) 552; *post*, § 508.

⁴ *Westchester Fire Ins. Co. v. Dodge* (Mich.), 9 Ins. L. J. 909.

⁵ *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136; *Lampkin v. Western Ass. Co.*, 13 U. C. (Q. B.) 237.

⁶ *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136. See end of this section.

⁷ [*Garretson v. Hawkeye Ins. Co.*, 65 Iowa, 468.]

⁸ *Ante*, § 485. [*Phoenix Ins. Co. v. Lebcher*, 20 Brad. 450; *Allemania Ins. Co. v. Little*, *id.* 431.]

⁹ *Mickey v. Burlington Ins. Co.*, Sup. Ct. (Iowa), 2 Ins. L. J. 15; *Grant v. Lexington Fire, Life & Mar. Ins. Co.*, 5 Ind. 23, 26; *Fullam v. New York Union Ins. Co.*, 7 Gray (Mass.), 61; *Black v. Winnesheik Ins. Co.*, 31 Wis. 74; *Derrick v. Lamar Ins. Co.*, 74 Ill. 404.

fault.¹ Thus, in *Ames v. New York Union Insurance Company*,² where the policy provided that suit must be brought within six months from the day of the loss, and that the insurers should have ninety days after proofs were furnished within which to pay, the proofs of loss were delivered to the defendants some nine days after the fire. They were then retained, without objection, for eighty-five days, when suggestion was made by the insurers that further proof was necessary, which further proof was furnished in seven days more. No further objections were made. By the delay, however, the time within which the plaintiff had a right to demand payment did not arrive till after the time limited for bringing suit. The defendants had thereby secured an extension of time within which to pay the loss, and put it out of the power of the plaintiff to successfully maintain a suit commenced within six months after the loss occurred. To the same effect is *Curtis v. Home Insurance Company*,³ where it is said that if the conduct of the insurers during the negotiations is such that the insured may

¹ [If by holding out hopes of amicable adjustment the company induce the insured to delay suit, the company is estopped to take advantage of the limitation in the policy. *Martin v. Slate Ins. Co.*, 44 N. J. 485. So if the company induces the insured to believe that the sum admitted to be due on an adjustment will be paid without suit, wherefore he delays beyond the period of limitation named in the policy, the company is estopped to set up this limitation. *Paul Fire & Mar. Ins. Co. v. McGregor*, 63 Tex. 399. Any conduct of the company that induces the assured acting as a prudent man to suppose that there is no necessity of bringing suit, or causes him to delay beyond the period of limitation, waives it. *Bish v. Hawkeye Ins. Co.*, 69 Iowa, 184. Letters from the company may be introduced to show that the promises of the company induced the plaintiff to delay action beyond the time limited. *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308. Delay in bringing a suit on a policy beyond the prescribed time, if induced by the company in bad faith, is no defence by them in an action. *Little v. Phoenix Ins. Co.*, 123 Mass. 380 at 389. Promises to pay made during the pendency of a suit waive such a limit, and excuse the non-prosecution of the said suit. *Home Ins. Co. v. Myer*, 93 Ill. 272 at 276.]

² 14 N. Y. 254; *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 472; *Akin v. Liverpool, &c. Ins. Co.*, C. Ct. (Ark.), 6 Ins. L. J. 341; *Coffee v. Universal Life Ins. Co.*, C. Ct. (Wis.), 10 Ins. L. J. 525; *Brady v. Western Ins. Co.*, 17 U. C. (C. P.) 597.

³ 1 Bissell (C. Ct. U. S.), 485. See also *ante*, § 360; *Davis v. Canada, &c. Ins. Co.*, 39 U. C. (Q. B.) 452; *Westchester Fire Ins. Co. v. Dodge* (Mich.), 9 Am. Law Record, 297.

reasonably believe that they intend to pay them, delay is excusable ; otherwise not. Upon a peremptory refusal to pay suit may be brought at once.¹ [Demanding and receiving proofs after the time has expired waives the limitation of suit.² So does a recognition of liability by the agent after expiration of the period.³ Where a policy provided against waiver of any condition unless by writing, the limitation of suit to six months cannot be waived by verbal representations of the agent that it is needless to sue, as the company will pay without it.⁴ But the president is not within the contemplation of the parties in using the word "agent" in the condition "no agent is empowered to waive any condition of the policy without special authority," and the president may waive the limitation of suit to six months.⁵ Payment to the mortgagee of his interest in the policy is not a waiver of the limitation as to the mortgagor.⁶ That the insured was arrested for arson, not at the instance of the defendant, is no excuse for not bringing suit within a year from the loss as provided in the policy.⁷]

§ 489. **Limitation ; Suit.** — "Suit" to recover a claim by

¹ *Ætna Ins. Co. v. Maguire*, 51 Ill. 342 ; *Penley v. Beacon Ass. Co.*, 7 Gr. Ch. (U. C.) 130 ; *Frey v. Wellington Ins. Co.*, U. C. (Ct. of App.) 15 Can. L. J. 190. *Contra*, *Hatton v. Provincial Ins. Co.*, 7 U. C. (C. P.) 555. So upon an adjustment of the loss. *Illinois Ins. Co. v. Archdeacon*, 82 Ill. 236 ; *Williamsburg Fire Ins. Co. v. Cary*, 83 Ill. 453. [Although a company may have sixty days in which to pay the loss, yet if before that time an authorized agent declares that it will not pay, suit may be commenced at once. *Georgia Home Ins. Co. v. Jacobs*, 56 Tex. 366 ; *State Ins. Co. v. Maackens*, 38 N. J. L. 564 ; *Hofecker v. N. C. C. M. Ins. Co.*, 5 Hous. (Del.) 101. When a company offers a specific sum, denying liability for some articles as not being covered by the policy, this is a waiver of the preliminary proofs of loss and of the time allowed for decision and payment, and suit may be brought without waiting for the lapse of the sixty days provided for by the policy. *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571. Proof of waiver of the "sixty days" or other time clause in a policy must be positive, as it is otherwise binding. *Schröder v. Keystone Ins. Co.*, 2 Phila. 206 at 286.]

² [*Cousineau v. City of Lond. Fire Ins. Co.*, 15 Ont. R. 329.]

³ [*Horst v. Insurance Co.*, 73 Tex. 67.]

⁴ [*Waynesboro Mut. Fire Ins. Co. v. Conover*, 98 Pa. St. 384.]

⁵ [*Universal Fire Ins. Co. v. Stewart*, 3 Pennypacker (Pa.), 536.]

⁶ [*King v. Watertown Fire Ins. Co.*, 47 Hun, 1.]

⁷ [*Edson v. Merchants' Mut. Ins. Co.*, 35 La. Ann. 353.]

virtue of the policy, means any proceeding in a court for the purpose of reaching and getting possession of the loss which may be found to be payable, under whatever mode the law permits. A creditor, for instance, of the person who suffers the loss may proceed by trustee process or foreign attachment, and under this try the question of the liability of the insurers to the insured. And such suit, if brought within the time limited, is a compliance with the condition.¹ Of course the creditor would, in such case, have no greater rights than his debtor; and if the debtor has failed to comply with a condition precedent to his right, as, for instance, to submit to examination on oath, when so required, his creditor cannot recover. That the debtor received no actual notice of the requirement will not help the creditor, if the insurers make reasonable efforts to notify him. If the want of notice were attributable to the negligence of the insurers, it might be otherwise. A failure, on their part, to notify within reasonable time might be deemed a waiver of the condition.² [When a clause in a policy declares that all actions against it for claims must be "prosecuted within a certain time," a mere presentation of proofs is not sufficient. There must be a *lis mota*.³]

§ 490. **Limitation as to Place.** — A provision in the charter defining the court in which suit may be brought, on certain conditions, is valid, if the conditions are strictly complied with. If not, suit may be brought in any court having jurisdiction.⁴ A condition in the contract limiting the venue or place where the action shall be brought, is invalid. There is an obvious distinction between a stipulation by contract as to the time when a right of action shall accrue or be lost, on the one hand, and a stipulation as to the forum before which, and the proceedings by which, an action shall be commenced and prosecuted, on the other. The one is a condition annexed to the acquisition and continuance of a legal right, and depends on contract and the acts of the parties; the other is a stipulation concerning the remedy, which is created and regulated

¹ Harris v. Phoenix Ins. Co., 35 Conn. 310.

² Ibid.

³ [Merchants' Mut. &c. Co. v. La Croix, 35 Texas, 249 at 262.]

⁴ Arnet v. Milwaukee, &c. Ins. Co., 22 Wis. 516.

by law. The time within which money shall be paid is matter of contract, depending on the will and acts of the parties; but in case of breach, the tribunal before which a remedy is to be sought, the means and processes by which it is to be conducted, affect the remedy, and are created and regulated by law. The remedy does not depend on contract, but upon law, generally the *lex fori*, regardless of the *lex loci contractus*, which regulates the construction and legal effect of the contract. It is, moreover, a well-settled maxim that parties cannot, by their consent, give jurisdiction to courts, and it would seem to follow that parties cannot take away jurisdiction where the law has given it. And mutual and stock companies are equally under the disability.¹ Upon the same general grounds an agreement not to sue, except in a particular State, will not defeat an action on the policy in a different State. Such an agreement is against public policy.² It is also against the statute of Missouri.³ If the venue be fixed by the terms of the charter, a subsequent act of the legislature changing the venue and extending the right to sue in counties where there is an agency of the insurers is valid, as affecting only the remedy.⁴

§ 491. **Limitation ; Strictly Construed.** — But the limitation as to venue and as to time will be strictly construed and confined to the exact case stated in the charter or contract. Thus where the charter provides that after a loss the directors shall proceed and determine the amount, and if the party suffering is not satisfied with the determination, he may bring his action at a particular court; if the directors repudiate the claim altogether, the party suffering may sue in any court open to him by the general provisions of law. The limitation can only be supported in the special case provided for.⁵ The reasons

¹ *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.), 174; *Hall v. People's Mut. Fire Ins. Co.*, id. 185; *Amesbury et al. v. Bowditch Mut. Fire Ins. Co.*, id. 596.

² *Reichard v. Manhattan Life Ins. Co.*, 31 Mo. 518.

³ Rev. Code, 884.

⁴ *Howard v. Kentucky & Louisville Mut. Ins. Co.*, 13 B. Mon. (Ky.) 282; *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238.

⁵ *Williams v. Columbian Mut. Ins. Co.*, 29 Me. 465; *Boynton et al. v. Mid-*

for the distinction are obvious. So far as the claim for insurance is disputed, and may be a subject of litigation between the parties, the insurers may well provide in their by-laws that an action shall be speedily brought, so that the extent of their liability may be settled while the facts are recent, and the witnesses by whom they are to be proved are readily accessible. But there is no such reason for the limitation of the time within which a suit shall be brought, when it is sought to recover only the amount under the policy, which has been ascertained and admitted to be justly due by the insurers.¹ And a limitation subject to a condition which may be defeated by either party, as that no suit shall be brought until the case has been submitted to arbitration, since either party may refuse to arbitrate, is invalid.²

dlexes Mut. Fire Ins. Co., 4 Met. (Mass.) 212; *Martin v. Penobscot Mut. Fire Ins. Co.*, 53 Me. 419; *Arnet v. Milwaukee Mech. Mut. Ins. Co.*, 22 Wis. 516.

¹ *Amesbury et al. v. Bowditch Mut. Fire Ins. Co.*, 6 Gray (Mass.), 608; *Bartlett v. Union Mut. Fire Ins. Co.*, 46 Me. 500; *Nevins v. Rockingham Fire Ins. Co.*, 5 Fost. (N. H.) 22; *Indiana Mut. Fire Ins. Co. v. Routledge*, 7 Ind. 25; *Phillips v. Prot. Ins. Co.*, 14 Mo. 220. In *Phillips's* case just cited, the distinction adverted to in *St. Louis Insurance Company v. Kyle*, 11 Mo. 278, that there could be no waiver of notice, while there might be of preliminary proof, is declared not to be well founded. It has been held, however, in Ohio, that, although the insurers neglect to ascertain and determine the loss, under a policy that provides that an action shall be brought in a certain county if the insured shall not be satisfied, the action must be brought in the county named; the statute of that State, providing that suits on policies of insurance may be brought in any county where the contract is made, except in cases where the policies are issued by companies whose charters specify the county in which suit shall be brought. *Portage County Mut. Ins. Co. v. Stukey*, 18 Ohio, 455. This decision seems to rest upon the peculiarity of the general statute. And in *Dutton v. Vermont Mut. Fire Insurance Company*, 17 Vt. 369, it is held, contrary to the almost uniform current of authorities, that a refusal to pay a claim is a determination and ascertainment, within the meaning of such a condition, and consequently no action can be maintained except as provided in the policy. No reference by court or counsel is made to any of the decisions to the contrary.

² *Leach v. Republic Fire Ins. Co.*, 58 N. H. 245; *post*, § 495.

CHAPTER XXVII.

ARBITRATION.

ANALYSIS.

- § 492. A general agreement to refer will not be specifically enforced, though encouraged by the courts, which will enforce an award fairly made.
A provision for adjustment by directors in case the policy is forfeited puts the matter in their hands, and the courts have no voice in the matter.
- § 493. A special agreement for reference which does not go to the root of the action, but merely provides for the adjustment of some *special* matter, as the amount of loss, or that some *particular person* or court shall settle all disputes, is valid (see also § 495).
But unless it is distinctly agreed that arbitration shall be a condition precedent, it will be treated as a collateral matter, and suit may go on upon the question of liability (unless the company admits it), while arbitration is being had on the amount of loss, or before it is had, § 493, and n. The action is to be brought on the policy, not the award, § 493.
- § 493 A. If arbitration is to be had upon the *written request* of either party, the company must *prove* a request in writing on its behalf, in order to set up the condition (see § 295, end).
- § 494. If by a charter provision it seems the intent of the legislature to compel resort to arbitration before going to the courts, the latter will require the parties to arbitrate first.
- § 496. Equitable adjustment after forfeiture. Discretion of directors.
- § 496 a. Fraud. Company may sometimes deny liability after award.
- § 496 B. Waiver or estoppel by refusal to pay any sum, or proceeding to repair, or bad faith.
Award void if arbitrators exceed their powers, or do not conform to conditions.
Arbitration upheld as an appraisalment.
If arbitrators first selected fail, a new selection should be made.

§ 492. **Agreement to refer generally invalid; Waiver.**—Not unfrequently policies contain a stipulation, that in case of loss, and the parties cannot agree upon the terms of adjustment, all matters in dispute shall be submitted to arbitration,—a practice which may be traced almost to the infancy of insurance, and originated no doubt in a laudable desire to avoid the

vexation, delay, and expense of litigation. It has not, however, proved so effectual for that purpose as was anticipated, since the courts have very uniformly deemed the stipulation to have no binding force. It plainly tends to oust them of their jurisdiction, and they will not specifically enforce the agreement.¹ An agreement not to bring an action after one year, and not to bring any action till arbitration has been had, is void.² If, however, the parties consent or prefer to adjust their disputes in this way, the courts will not only not interfere to prevent, but will rather encourage, such a course; and if arbitration be resorted to, and proceed to an award, the award will be recognized as a good plea in bar to an action on the policy.³ So where there has been an actual submission, and the reference is still pending,⁴ And the courts will enforce the award.⁵ [Where the question of insurable interest is submitted to arbitration (resulting in favor of the plaintiff) the court cannot go behind the award.⁶] But neither a provision enabling the parties to submit matters in controversy to arbitration, nor a covenant so to do, will prevent the courts from taking their rightful jurisdiction in the premises. All such agreements have for their purpose the substitution of a tribunal, erected by the parties, for the tribunal which public policy and the general laws have established and clothed with the requisite powers to make them the efficient and, upon the whole, the best means of hearing and determining controver-

¹ *Thompson v. Charnock*, 8 T. R. 139; *Goldstone v. Osborne*, 2 C. & P. 550; [*German-Amer. Ins. Co. v. Etherton*, 25 Neb. 505, 508; *Hurst v. Litchfield*, 39 N. Y. 377 at 379; *Mark v. Nat. Fire Ins. Co.*, 24 Hun, 565. A condition in the policy to refer to arbitration does not prevent bringing a suit at law or in equity. *Reed v. Washington Ins. Co.*, 138 Mass. 575. A general agreement not to bring suit until after an award shall be made, is revocable by either party, and the bringing of suit is in itself a revocation. *Commercial Union Ass. Co. v. Hocking*, 115 Pa. St. 407.]

² *Leach v. Republic Ins. Co.* (N. H.), 9 Reptr. 181; s. c. 58 N. H. 245.

³ *Roper v. London*, 1 El. & El. (Q. B.) 825; 102 E. C. L. 825; *Burchell v. Marsh*, 17 How. (U. S.) 344; *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92. But see *Barber v. Fire, &c. Ins. Co.*, 16 W. Va. 658.

⁴ *Kill v. Hollister*, 1 Wilson, 129.

⁵ *Richardson v. Suffolk Ins. Co.*, 3 Met. (Mass.) 573; *Hughes v. Mut. Fire Ins. Co. of New Castle*, 9 U. C. (Q. B.) 387.

⁶ [*Troop v. Anchor M. Ins. Co.*, 3 Russ. & Geld. (Nova Scotia) 234.]

sies between individuals. If the stipulation were to be held valid, the courts might be called upon to enforce it. The dispute would thus come to them at last, and they have preferred to ignore the validity of the stipulation and to refuse to enforce it, rather than permit themselves to be occupied with the somewhat ludicrous question whether parties may come into court for the purpose of compelling each other to keep out.¹ In Louisiana, it has been intimated that the agreement to refer would be upheld if insisted upon; but the point was not directly in issue, the court holding that the insurers, having refused to pay, without invoking this article, had waived the right to set it up in bar of the action.²

§ 493. **Arbitration; Agreement to refer Special Matter valid.** — While, however, it is perfectly well settled that any agreement that contemplates the exclusion of an aggrieved party from a suit of law is invalid, there seems to be no doubt that any agreement as to the mode of adjustment or of settling the amount of loss, or the time for paying it, or any particulars of that nature which do not go to the root of the action, but are preliminary thereto or in aid thereof, — as, for instance, an agreement that at the trial of an action it shall not be lawful for either party to enter into the question of the amount of the loss, but that it shall always be settled by reference, and that the only question to be tried at law shall be the right to recover, — is valid.³ A distinction is made between an agree-

¹ *Kill v. Hollister*, 1 Wilson, 129; *Scott v. Avery*, 20 Eng. L. & Eq. 327; s. c. 5 H. L. C. 811; *Scott v. The Phoenix Ass. Co.*, 1 Stuart (L. C.), 152; *Stephenson v. P. F. & M. Ins. Co.*, 54 Me. 55, 70.

² *Millaudon v. Atlantic Ins. Co.*, 8 La. 557. See also *Robinson v. Georges Ins. Co.*, 17 Me. 131. And if the policy provides one mode of appraisal, and the insurers provide a different mode, it may amount to a waiver. *Davis v. Western Mass. Ins. Co.*, 8 R. I. 277.

³ [When it is agreed that no suit shall be maintained until an award has been had, fixing the amount of the claim, the agreement will be respected by the courts. *Adams v. Insurance Cos.*, 70 Cal. 198; *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297; *Gauche v. Lond., &c. Ins. Co.*, 10 Fed. Rep. 347; 4 Woods, 102. Where an award upon "matters in dispute" is a condition precedent to action, delay of the arbitrators in coming to a decision will not justify suit, even though the company denies all liability. *Lantalum v. Anchor Mar. Ins. Co.*, 22 N. B. R. 14. But an agreement to fix the amount of loss by arbitration does not make it a condition precedent to suit unless clearly so stipulated. *Canfield v. Water-*

ment to refer every matter in dispute to arbitration, and one to pay such a sum as the damage shall be found by a third party to amount to, which latter operates to reduce the policy from a contract to pay the amount of damage absolutely, and to substitute the arbitrator for the jury to ascertain its amount.¹ The following condition is common in English policies, and is believed to be valid:—

“If any difference shall arise in the adjustment of a loss, the amount (if any) to be paid by the company shall, whether the right to recover on the policy be disputed or not, and independently of all other questions, be submitted to the arbitration of some person, to be chosen by both parties, or of two indifferent persons, one to be chosen by the party insured, and the other by the directors. And in case either party shall refuse or neglect to appoint an arbitrator within

town Fire Ins. Co., 55 Wis. 419; *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329; *Liverpool, &c. Ins. Co. v. Creighton*, 51 Ga. 95 at 110. A mere stipulation that in case of a difference of opinion as to the amount of loss, it shall be submitted to arbitration is not a condition precedent to action on the policy, but a collateral agreement. *Crossley v. Conn. Fire Ins. Co.*, 27 Fed. Rep. 30 (Mass.) 1886 (reviewing Eng. & Amer. cases). Suit may be brought before the arbitration. And a stay of proceedings at law will not be granted in such a case unless the company will admit its liability. If it will not, then the suit may go on to establish liability for the loss, and the arbitration will go on to fix the amount. *Hughes v. Lond. Ass. Co.*, 4 Ont. R. 293. If there is a stipulation that if a dispute shall arise as to the amount of loss, it shall on request of either party be referred to arbitrators. It is not a condition precedent to action, but whether at the trial the amount of loss can be proved against the defendant's objection by any other evidence than an award, where one has been requested, is a question suggested by the judge, but not decided, because it did not arise on the record. *Gere v. Council Bluffs Ins. Co.*, 67 Iowa, 272. The answer would seem clearly no, if the request was made within proper time. Otherwise the agreement for arbitration of loss could be annulled by one party to it, which is directly contrary to both reason and authority, wherever the provision for arbitration refers to amount of loss and does not prevent suit. A clause providing for arbitration in respect to the “amount of sound value and of damage to the property,” has no reference to property absolutely destroyed. *Rosenwald v. Phoenix Ins. Co.*, 50 Hun, 172. A stipulation for an appraisal as a pre-requisite to suit is legal. *Wolff v. Insurance Co.*, 50 N. J. 453.]

¹ *Scott v. Avery*, 20 Eng. L. & Eq. 327; s. c. 5 H. L. C. 811; *Braunstein v. Accidental Death Ass. Co.*, 1 B. & S. 782; *Tredwen v. Holman*, 1 H. & C. 72; *Lowndes v. Stamford*, 18 Q. B. 425; *Trott v. City Ins. Co.*, 1 Cliff. (C. Ct. U. S.) 439; *London, &c. Ins. Co. v. Honey*, 2 Vict. L. Rep. L. 9; *Wright v. Ward*, 24 L. T. N. s. 439.

twenty-eight days after notice, the other party shall appoint both arbitrators; and in case of the arbitrators differing therein, the amount shall be submitted to the arbitration of an umpire, to be chosen by the arbitrators before they proceed to act, and the award of the arbitrators or umpire (as the case may be) shall be conclusive evidence of the amount of the loss, and the party insured shall not be entitled to commence or maintain any action at law or suit in equity upon his policy, until the amount of the loss shall have been referred and determined as hereinbefore provided, and then only for the amount so awarded. Each party to pay his or their own costs of the reference, and a moiety of the costs of the award, and of the arbitrators and umpire; and the reference, in all other respects, to be subject to such rules and conditions as are usually inserted in orders of reference at *Nisi Prius*, if the parties differ about the same.”¹ In *Goldstone v. Osborne*,² the agreement was, that if any difference should arise on any claim, it should be submitted to arbitration, and that no compensation shall be payable until after an award determining its amount. But, it appearing that the insurers disputed the right of the plaintiff to recover any thing, Best, C. J., allowed the action to go on, although there had been no reference as to the amount of loss.³ [Where it is agreed that an award shall have no reference to any other question than the estimate of damage done, the assured properly brings an action on the policy and not on the award.⁴ When parties stipulate that disputes, whether actual or prospective, shall be submitted to the arbitrament of a particular person or tribunal, they cannot seek redress elsewhere.⁵ When the contract provided that “the chief engineer of the railroad” should settle all disputes, it was held that it must refer to the

¹ Law of Fire Insurance, Bunyon, 108.

² 2 C. & P. 550.

³ See also *Millaudon v. Atlantic Ins. Co.*, 8 La. 557.

⁴ [*Soars v. Home Ins. Co.*, 140 Mass. 343.]

⁵ [*Snodgrass v. Gavit*, 28 Pa. St. 221 at 224, *dictum*. The decision there is final. *O'Reilly v. Kerns*, 52 Pa. St. 214 at 217; *Condon v. South Side R. R.*, 14 Grat. 302 at 309.]

person holding that office when the dispute arose, not when the contract was made.^{1]}

[§ 493 A. **Arbitration to be had upon Written Request.**— When the policy provides for arbitration upon the *written request* of either party, a request in writing is a condition precedent to appraisal and award, and if there is no such request arbitration is not necessary before suit.² When it was in the power of the company to have an arbitration by written request, and they did not avail themselves of the right, they are estopped from setting up “no award” as a defence to an action by the assured.³ The company must prove a written request in order to set up the condition. A verbal request is not sufficient.⁴ If written request is not made, the condition for arbitration is waived.⁵ And although the parties do actually attempt to arbitrate without written request, it is a common-law arbitration subject to revocation, and the bringing of suit is such a revocation. Where in case of any difference touching any loss the matter is, at the written request of either party, to be submitted to arbitrators, and no action is to be brought until the amount of loss is fixed by an award, and it appears that the plaintiff made a written request for arbitration, but the company refused, the plaintiff may proceed with his suit.^{6]}

§ 494. **Arbitration ; Provision for in Charter.**— If, by the terms of the charter, arbitration be provided for in such a manner as to indicate that it is the intention of the legislature to erect such a tribunal for the benefit of the parties, and to compel a resort to arbitration in the first instance, before appealing to the courts, then the courts will not entertain a suit until such arbitration has been had.⁷ The question underwent

¹ [North Lebanon R. R. v. McGrann, 33 Pa. St. 530 at 534.]

² [Wright v. Susquehanna Mut. Fire Ins. Co., 40 Pa. St. 29.]

³ [Phoenix Ins. Co. v. Badger, 53 Wis. 283 at 288.]

⁴ [Wallace v. Ger.-Am. Ins. Co., 2 Fed. Rep. 658 (Iowa), 1880 ; 1 McCrary, 335.]

⁵ [Nurney v. Fireman's Fund Ins. Co., 63 Mich. 633.]

⁶ [Adams v. National Ins. Co., 20 N. B. R. 569 ; Bowes v. National Ins. Co., id. 438. (In the first case one judge held that the refusal of the company to appoint an arbitrator would not relieve the insured from the condition).]

⁷ Reeves v. White, 10 Eng. L. & Eq. 332 ; Crisp v. Bunbury, 8 Bing. 394 ; *Ex parte Payne*, 5 Dowl. & L. P. C. 679.

further elaborate consideration in the case of *Elliott v. Royal Exchange Insurance Company*,¹ where the discussion turned upon the point whether the form of the provision in question was such as to amount to a condition precedent, or only to a collateral stipulation. If the former, then it was valid; if the latter, then it was of no avail. The facts were, so far as they do not appear in the opinion of the court, that the policy, which was under seal, in one of its articles provided that "the loss or damages, after the same shall be adjusted, shall immediately be paid," and that "in case any difference shall arise touching any loss or damage, such difference shall be submitted" to arbitrators, whose award in writing shall be conclusive and binding on the parties. The covenant was to pay according to the exact tenor of the articles subjoined to the policy. Upon this policy an action was brought, and the defendants replied that a difference arose between them and the plaintiff, which the plaintiff refused to submit to arbitration. The majority of the court concurred with Kelly, C. B., who said:—

"The question in this case is, whether the plaintiff is entitled to recover the amount of a loss by fire, which he has suffered, and for which he claims to be compensated under a policy effected by the defendants, such loss not having been adjusted as pointed out in the articles, subject to which the policy was made. The form of the policy is a covenant by the defendants that their capital, stock, &c., shall be subject to make good the plaintiff's loss, £2200, 'according to the exact tenor of the articles thereunto subjoined.' If the sentence had stopped at the figures £2200, and in a subsequent part of the instrument there had been independent provisions, which might be supposed to have qualified these words, it might have been a question of greater doubt whether these provisions were to be held a condition precedent or a collateral stipulation, which could not avail to oust the jurisdiction of the court. But the covenant is itself, in its very terms, qualified and made conditional by the subsequent words referring to the articles, which, following without any interval, form an integral and substantial part of the cove-

¹ 2 L. Rep. (Exch. Cas.) 237.

nant. Therefore, in order to ascertain whether, when a loss has been sustained by the insured, a right of action has accrued to him, we must look at the articles, 'according to the exact tenor' of which the insurance is to be paid. Now the 10th article provides that upon the occurrence of any loss or damage by fire, the party is forthwith to give notice to the officers, and within fifteen days to deliver in a particular account of his damage, evidenced and verified as may be required, 'which loss or damage, after the same shall be adjusted, shall immediately be paid in money,' with an option to the company to reinstate. Collecting the meaning of the parties from the language used by them in this sentence, and putting on it the ordinary and usual construction, the effect is, not that the plaintiff is, in the event of loss, entitled immediately to recover the amount of his loss, but what he is entitled to recover is the amount of the loss after it has been adjusted, which means adjusted in the manner pointed out by the subsequent articles. It appears to me that to decide to the contrary would be to disregard entirely the obvious intentions of the parties, expressed in words which state emphatically that before the loss is paid its amount shall be adjusted.

"We were pressed with the weight of authority, and it was ably argued that it is impossible to decide in favor of the defendants, consistently with prior decisions, and with the well-recognized principle, that no contract shall oust the jurisdiction of the courts of law; and it was urged that the contract was neither more nor less than a contract on the part of the company to make good the loss, with a separate and collateral stipulation that the amount shall be referred to arbitration. It is no doubt difficult to reconcile and give effect to two propositions so nearly in direct opposition, as that no contract of the parties shall oust the jurisdiction of the courts, and that on any difference arising between two parties, it shall be referred to arbitration. But the fair result of the authorities is that, if the contract is in such terms that a reference to a third person, or to a board of directors, is a condition precedent to the right of the party to maintain an

action, then he is not entitled to maintain it until that condition is complied with; but if, on the other hand, the contract is to pay for the loss (or other matter in question), with a subsequent contract to refer the matter to arbitration, contained in a distinct clause, collateral to the other, then that contract for reference shall not oust the jurisdiction of the courts, or deprive the party of his action. Now it seems to me impossible, without directly overruling or disregarding the decision of the House of Lords, in *Scott v. Avery*,¹ to say that the stipulation here is not a condition precedent. There the words were that 'the sum to be paid by this association to any suffering member for any loss or damage shall, *in the first instance*, be ascertained by the committee.' Here they are 'that the loss, *after the same shall be adjusted*, shall immediately be paid.' In both cases a stipulation follows that any difference arising between the parties shall be referred to arbitration. The House of Lords, in that case, having held that the ascertainment of the loss by the committee or by arbitration was a condition precedent, and that without such ascertainment the plaintiff had no cause of action, I cannot see any distinction which would justify us in holding here that the adjustment of the loss, as provided in the articles, was not a condition precedent. All the cases cited were in favor of the defendants' contention, with the exception of *Horton v. Sayer*² and *Roper v. Lendon*,³ which were both decided on the ground that the agreement to refer was only a collateral stipulation. In the latter case, the court came to that decision on a contract very much resembling the present one. I do not enter into the question whether the true construction was put on the instrument in that case; the point seems to have been given up early in the argument, and the matter was hardly discussed. But on another part of the same contract, words contained in one of several conditions, subject to which the policy was made, were held to constitute a condition precedent; and that part of the decision rather supports our present judgment. This contract, I think, speaks plainly to

¹ 5 H. L. C. 511.² 4 H. & N. 643.³ 1 E. & E. 825.

the effect I have stated, and my judgment therefore is for the defendants.”¹

Bramwell, J., dissented, not because he differed with his brethren as to the law, but because he thought the provision in question a collateral stipulation and not a condition precedent.²

¹ Elliott v. Royal Exchange Ass. Co., Law Rep. (2 Exch. Cas.) 237.

² The opinion, though a dissenting one, is worth the space we shall be obliged to give it in this note. Bramwell, J.: “I think the plaintiff is entitled to judgment. I agree that there is no doubt as to the law, nor did I ever think there was, even before the decision in Scott v. Avery. In the argument of that case (the arbitration clause in which was framed by Mr. Justice Cresswell) Mr. Manisty and myself were counsel for the defendants. We scarcely cited a case, but laid down a proposition which was almost immediately adopted by the judges below and by the House of Lords. That proposition was, that if two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has so assessed the sum. For to say to the contrary would be to give the party a different measure or rate of compensation from that for which he has bargained. This is plain common sense, and is what I understand the House of Lords to have decided in Scott v. Avery. Now the construction of this policy appears to me far from clear, upon the point whether the defendants agree to pay the adjusted amount, or whether they agree to pay the actual loss, with a provision for adjusting the loss. If the latter is the true construction, then the principle of Scott v. Avery does not apply, or rather it applies to exclude them from their defence. The words of the policy are that the defendants will pay to the plaintiff ‘any loss or damage by fire,’ according to the tenor of the articles. The articles, which are thus part of the covenant, then say, ‘which loss or damage, *after* the same shall be adjusted, shall immediately be paid.’ To my mind, these words refer not to an essential term of the covenant (which I prefer to the phrase ‘condition precedent’), but to the time when the payment is to be made, that is, immediately after the adjustment. This verbal examination may seem critical, but it is called for; for if the adjusted loss only is stipulated to be paid, the consequence will be that if the assured, after the adjustment, discovers that something has been burned which has been *bona fide* omitted from his claim, he will be precluded by this clause from recovering it. But I do not think that it was in the contemplation of the parties to be so irrevocably bound. If not, then the agreement is to pay not the adjusted, but the actual amount, with a proviso for settling the matter in case of dispute. The clause goes on to say that the defendants may, at their option, restore; so that it is not merely their intention to pay the adjusted loss. It is then provided that in case ‘any difference shall arise, touching any loss or damage,’ it shall be settled by arbitration. Now it is impossible to say that this is

§ 495. **Arbitration; Condition.** — In *Campbell v. American Popular Life Insurance Company*,¹ where it was provided that payment of the loss was to be on condition that, in the opinion of the surgeon-general of the company, the insured did not die from “intemperance,” while if such was his opinion then the company were to repay all the premiums, with compound interest, the subject came again under consideration, with a result favorable to the validity of the provision as a condition precedent. The court thus stated its views as to the present state of the law: “It is not denied,” say the court, “that any mere agreement between the parties that any future differences growing out of their contract shall be decided by arbitrators or referees, thereafter to be chosen, will not be allowed by the court to oust their jurisdiction. But in this branch of the law there exist distinctions which, if carefully observed and followed, will, in our judgment, reconcile the authorities, and produce a beautiful correspondence, where at first view there may appear nothing but a conflict of authorities. The leading case on this question was that of *Kill v. Hollister*,² decided in the Court of King’s Bench. The following is the condensed and careful opinion in this case: ‘This is an action upon a policy of insurance, wherein a clause was inserted that, in case of any loss or dispute about the policy, it should be referred to arbitration; and the plaintiff avers, in his declaration, that there has been no reference. Upon the trial at Guildhall the point was reserved for the consideration of the court, whether this action was well laid before reference was had. And by the whole court: If there had been a reference depending, or made and determined, it might have been a bar; but the agreement of

merely a substitute for adjustment between the parties, for, under these words, the arbitrator would have power, not merely to adjust the amount that shall be paid, but to determine whether the plaintiff shall have any payment at all, or whether, by reason of non-payment of premiums or of fraud, he has forfeited his right to recover. I think, therefore, that this is a collateral agreement to refer to arbitration, and not an agreement that only the adjusted loss shall be paid.”

¹ Supreme Court, Dist. of Columbia, 5 L. Times (U. S. Reports), 6; s. c. 2 Big. Life & Acc. Ins. Cas. 16; 1 McArthur (D. C.), 246, 471.

² 1 Wilson, 129.

the parties cannot oust the court. And as no reference has been nor any is depending, the action is well brought, and the plaintiff must have judgment.' To the same effect are *Thompson v. Charnock*,¹ *Goldstone v. Osborne*,² and *Street v. Rigby*,³ following a prior decision made by Lord Thurlow, to which may be added *Scott v. Avery*.⁴ These decisions, however, do not apply to an agreement where the parties have actually chosen and named the referee; for in such a case the court say, in *Kill v. Hollister*, the reference might have been pleaded in bar. It is only the imperfect and executory agreement to have a reference entered into hereafter which the court say will not oust its jurisdiction. It is because no reference has been agreed upon and settled between the parties, that the agreement is not a bar.⁵ An imperfect and executory agreement, such as that referred to, cannot be enforced in equity, for the reason that a court of equity will not and cannot compel the parties to come to an agreement in the choice of referees. . . . If the controversy, therefore, be not in effect actually referred by such an agreement, as it certainly is not, it must remain under the jurisdiction of the court. . . . The effect of these decisions, therefore, is this, and nothing more, that an agreement to refer, which is so imperfect as not to be specifically enforced in equity, and for breach of which nothing but nominal damages can be recovered at law, will not be allowed to oust the courts of jurisdiction, else there will be a failure of justice. . . . But if the contract be drawn in the 'prudential way,' recommended by Lord Eldon,⁶ by inserting a stipulation for 'liquidated damages, or there be a separate bond to bind the parties by

¹ 8 T. R. 136.

² 2 C. & P. 550.

³ 6 Ves. 815.

⁴ 8 Exch. 487.

⁵ With due deference to the learned court, it is suggested that the effect of the decision in *Kill v. Hollister* is not accurately stated. They do not say that an agreement to refer to a particular person would be good. They say only that an agreement to refer will not oust them of their jurisdiction, but intimate that if the agreement had been *acted on*, then it might have been a good plea in bar.

⁶ "There might have been an agreement for liquidated damages to enforce a specific performance, if an action could not produce sufficient damages, or equity would not entertain a bill for specific performance." Per Lord Eldon, *Street v. Rigby*, *ubi supra*.

penalty to its performance, the contract must be fulfilled, or the penalty will be enforced." And nowhere, adds the court, "have we been able to find a decision or even a *dictum* to sustain the doctrine of the court below, . . . that a contract, binding the parties to a reference, was contrary to public policy." This case doubtless well stands on the doctrine upon which the cases of an agreement to procure the certificates of certain persons to certain facts, before action can be brought, are upheld, to wit, on the ground that they are by contract made conditions precedent to the bringing of an action, and are subject to no such objection as is an agreement to refer, which, if held to be valid, cuts off all right of action. Any stipulation, therefore, which merely looks to the requirement of certain acts to be done or omitted before bringing an action, seems to be valid, since such a stipulation not only does not oust the courts, but obviously contemplates and makes preparation for an appeal to the courts. The distinction between an agreement to do certain things before bringing an action, and an agreement to refer to arbitration, which is tantamount to an agreement not to bring an action, is too obvious to need remark. Any agreement which does not prevent the parties from coming into court will doubtless be sustained; as, for instance, an agreement to submit to arbitration what amount will be due, if any, reserving the question of liability.¹ If, however, the agreement to arbitrate as to the amount be subject to the qualification that it be "at the written request of either party," an action will be sustained if neither has so requested before action brought.²

§ 496. **Arbitration ; Equitable Adjustment after Forfeiture.** — In *Nightingale v. State Life Insurance Company of Worcester*,³ there was a provision in the policy that in case of

¹ *Yeomans v. Girard Fire Ins. Co.*, C. Ct. (N. J.), 5 Ins. L. J. 853; *Trott v. City Ins. Co.*, 1 Cliff. (C. Ct. U. S.) 439; *ante*, §§ 484, 485, 491. But see *Mentz v. Armenia Fire Ins. Co.*, 79 Pa. St. 478. See also, upon the general subject, the learned note by Judge Bennett, appended to the case of *Scott v. Phoenix Assurance Company*, in the first volume of his *Fire Insurance Cases*, page 122.

² *Wallace v. German-American, &c. Ins. Co.*, 2 Fed. Rep. 658; *Mentz's Case*, *supra*.

³ 5 R. I. 38.

forfeiture from any cause the party interested should have the benefit of such equitable adjustment as may, from time to time, be provided by the board of directors; and it was held that, whether any such adjustment could be made was entirely in the discretion of the directors, not in any way subject to the control of the court. "It is true," said Ames, C. J., in giving the opinion of the court, "that by the qualifying clause of the condition of forfeiture the executors of the assured would have been entitled to the benefit of any equitable adjustment provided for by existing rules established by the directors, or accorded by their special act. Whether such rules should be established, or such special dispensation from the forfeiture should be granted, was, as it seems to us, left by this qualifying clause wholly to the discretion of the directors, who 'from time to time' might act in the matter; except, indeed, that they should not be permitted to change, to the injury of the assured, an established rule of adjustment, existing at the time of the act or omission, of the forfeiture. The construction which supposes that such discretion was designed by both parties to the contract to be reposed in the directors, as fair arbiters for all interested, borrows support from the fact that, under the charter of this company, the directors are elected by the joint votes of the assured and holders of the guaranty stock, and are to be chosen, in moieties, out of these two classes of the members of the corporation. No rule of equitable adjustment applicable to the case at bar appears to have been established by the directors of this company, and the request made to them by the claimants for special action in their favor was, upon full consideration, rejected. We cannot interfere with their discretion in this matter without doing violence to the contract upon which we are called to adjudicate." In *Manby v. Gresham Life Assurance Company*¹ there was an agreement, if the insured's health should improve, to remit an extra premium charged on account of the infirm state of his health, upon the "society being satisfied" of the fact. Having entirely recovered, and become sound and well, the insured brought his bill in equity to compel them to remit

¹ 29 Beav. 439.

the premium. But the court said they could not interfere with the judgment of the directors, if *bona fide* exercised. It could not undertake to say in which way their judgment should be given.

§ 496 *a*. **Arbitration ; Fraud.** — But fraud in the negotiation of the contract taints the agreement for arbitration, as also every other provision. If, therefore, the arbitration be entered upon and concluded by a decree, and subsequent thereto it comes to the knowledge of the insurers that the policy was procured by fraud, or for a fraudulent purpose, the court will set aside the decree, although by the terms of submission it is to be final, and although one of the grounds upon which it is sought to be set aside was in issue before the arbitrator.¹

[§ 496 B. **Waiver ; Void Awards, &c.** — Refusal of the company to pay any sum is a waiver of the arbitration clause, and suit may be maintained at once.² And when the company took possession of the injured vessel and proceeded to repair her with a view to making good their loss, this was deemed a waiver of arbitration.³ If either party acts in bad faith to defeat the real object of the arbitration clause the other is absolved from duty in regard to it.⁴ When arbitrators exceed their powers the whole award is void.⁵ When the policy provided that arbitrators, if needed, should be chosen by the parties and be disinterested proof that neither of these conditions were carried out, avoids the award.⁶ An appraisement is valid though the appraisers be not sworn, and the mere fact that the submission was in writing and in the nature of a submission to arbitrators will not operate to make the matter an arbitration and so void under the statutes for want of

¹ *Hercules Ins. Co. v. Hunter*, 14 Ct. of Sess. Cas. (Scotch), 147, 1137; 15 *id.* 800. [Arbitration and award as to the amount of loss does not prevent the company from afterward denying liability on a ground known at the time of submitting to the arbitration. *Johnson v. Amer. Fire Ins. Co.*, 18 *Ins. L. J.* 724 (Minn.), Aug. 12, 1889.]

² [*Western Ins. Co. v. Putnam*, 20 *Neb.* 331.]

³ [*Cobb v. N. E. Mut. Ins. Co.*, 6 *Gray*, 192 at 204.]

⁴ [*Uhrig v. Williamsburgh City Fire Ins. Co.*, 101 *N. Y.* 362.] *

⁵ [*Skipper v. Grant*, 10 *C. B. N. s.* 237 at 250.]

⁶ [*Ætna Ins. Co. v. Stevens*, 48 *Ill.* 31 at 33.]

formalities.¹ If the contract provides for arbitration, and the appraisers severally appointed by the company and the insured fail to agree on a third, this does not justify suit. The insured should propose a new selection of appraisers.² When several underwriters have referred to an arbitrator, before trial, a case against them for consolidated damages and he has rendered a sum due from all to which they consent the cause cannot be remanded to him to apportion the sum among them, unless all consent.³]

¹ [*Zallee v. Laclede Mut. Fire & Mar. Ins. Co.*, 44 Mo. 530 at 533.]

² [*Davenport v. Long Island Ins. Co.*, 10 Daly, 535.]

³ [*Kynaston v. Liddell*, 8 Moore, 223 at 224.]

CHAPTER XXVIII.

OF WAIVER AND ESTOPPEL.

ANALYSIS.

- A § 497.** **General Rules.** Any conduct recognizing the policy as valid after breach of condition, or any act that puts the insured to expense and trouble on the justifiable belief that the company still regard the policy as good, will be sufficient. Waiver must be pleaded. It is a question for the court if facts are admitted, otherwise for jury.
- B § 498.** **Waiver or estoppel may be by the act of an agent within his authority.**
 Where the agent makes the survey which is signed by the applicant relying on the agent's assurance that it is all right, misstatements in it of the distances of surrounding buildings, &c., cannot avail the company, § 498.
 So where an applicant signed a blank application stating to the agent that there was a mortgage, and the agent afterward filling in the answers stated that there was no incumbrance, § 498.
- § 499.** A company cannot through its agent write representations of which the assured knows nothing, and then hold him to them.
- § 500.** It is always a question of fact whether the agent in any given matter acted for the insurer or for the insured. An agent filling in wrong number and amount of prior policy after the insured has signed the application is acting as the company's agent. If the insured answers fully, and the agent deems part of the answer immaterial, and omits to write it down, the company cannot avail themselves of the condition that the answer must be full.
- C § 501.** **Estoppel by facts arising during negotiations.**
 Issue of policy upon application containing an ambiguous answer, or no answer to certain questions, waives them, unless the omission signifies the affirmance of a certain state of facts.
 Prepayment, change of location, &c., waived.
 Issue or renewal with knowledge of facts is a waiver generally, but not as to want of insurable interest.
- § 503.** Where insurer knows the undertaking of the assured is impossible, he cannot insist upon it.
- D § 502.** **Estoppel by facts arising during currency of the policy.**
 After knowledge of the facts, any recognition of the validity of the policy or conduct that misleads the assured to his prejudice amounts to a waiver.

Agent's knowledge of a cause of forfeiture and receipt of *after-maturing* premium or assessment is a waiver unless there is an understanding to the contrary.

Courts will find a waiver on slight evidence.

§ 502 a. Notice. Option (see also § 512). Notice from stranger.

E §§ 504-505. Estoppel by facts arising after loss.

Same principles as above.

Any overlooking of known forfeiture properly relied on by the assured to his prejudice is a waiver or estoppel.

Entering negotiations for settlement, adjusting loss, promising to pay, payment, &c.

§ 504 A. Refusal to pay on one ground waives others. Demanding proofs (or even *allowing* assured to go to the expense of making them (?)) waives a known cause of forfeiture, *contra*.

There is no estoppel

§ 506. Where the facts are not known.

§ 507. Nor where the insured has not been prejudiced.

§ 508. Silence usually no estoppel.

The act constituting a waiver must be intentional, and not a mere mistake.

§ 509. Agent acting under undisclosed instructions.

§ 511. Stipulation against waiver. Limitation of agent's authority.

Opinions vary as to the effect of conditions against waiver by agent, or requiring all waivers to be in writing, or indorsed on the policy. It is held —

that such provisions are valid ;

that they are null and void ;

that they do not apply to matters connected with the creation of the contract ;

and that they apply only to such matters.

The courts in many instances show a tendency to repudiate the condition as unreasonable. On the facts most of the cases are fair, and the consideration that *these conditions may themselves be waived as well as any others* goes far to harmonize the decisions.

§ 513. Collusion between agent and insured.

§ 497. **General Rules.** — Insurers may, and often do, find themselves in such a position that they cannot avail themselves either of a breach of warranty, or of a misrepresentation or concealment. And when in this position they are said to be estopped from availing themselves, or to have waived the right to avail themselves, of such a defence. And the rule here is, with reference to the negotiations had at the time of taking out the policy, that where the application is reduced to writing by the insurer or his agent upon the oral statement of the applicant, whether the application is, or is not, made tantamount to a warranty, by being made part of the contract,

the insurer being under a strong moral obligation to secure to the applicant the protection for which he pays, if a controversy arises upon the truthfulness of the application, and statements alleged by the insurer to be essential were omitted, and others falsely made, and he seeks to avoid the contract on that ground, parol evidence is admissible to show that, at the time the negotiations were pending, the facts alleged to have been omitted or falsely stated were in fact truly stated, or were accepted, as they were stated, as and for the truth, by the insurer, or that the conduct of the insurer led the applicant to believe that such as were omitted were immaterial, and such as were alleged to be false were truly made.

To deliver a policy with full knowledge of facts upon which its validity may be disputed, and then to insist upon these facts as ground of avoidance, is to attempt a fraud. This the courts will neither aid nor presume; and when the alternative is to find this, or to find that, in accordance with honesty and fair dealing, there was an intent to waive the known ground of avoidance, they will choose the latter.¹

Such an issue is tantamount to an assertion that the policy is valid at the time of the delivery, and is a waiver of the known ground of invalidity.² So is the issue of a policy upon an application to a question in which no answer is given.³

And any acts, declarations, or course of dealing after delivery by the insurers, with a knowledge of the facts constituting a breach of a condition of the policy, recognizing the policy as still valid, and from which the insured might fairly infer that he was protected, will amount to a waiver of such breach, and estop the insurers from setting it up in defence;⁴

¹ *Mahony v. National, &c. Life Ass. L. R. 6 C. P. 252.*

² *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Morrison v. Universal, &c. Ins. Co.*, 8 L. R. (Ex.) 40; *Geib v. Enterprise Ins. Co.*, 1 Dill. C. Ct. 443, 449; *Lorillard Fire Ins. Co. v. McCulloch*, 21 Ohio St. 176; *Richmond v. Niagara Fire Ins. Co.*, 79 N. Y. 230; *Peoria Mar. & Fire Ins. Co. v. Perkins*, 16 Mich. 380; *Van Schoick v. Niagara Ins. Co.*, 68 N. Y. 434; *Bennett v. North British, &c. Ins. Co.*, 81 id. 273; *Shaw v. Scottish Provincial Ins. Co.*, 1 Fed. Rep. 761; *Michigan, &c. Ins. Co. v. Lewis*, 30 Mich. 41; *Germania Fire Ins. Co. v. McKee*, 94 Ill. 494; *Smith v. Commonwealth Ins. Co.*, 49 Wis. 322.

³ *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345.

⁴ *Georgia Home Ins. Co. v. Kinnier*, 28 Grat. (Va.) 88. See also *post*, § 502.

and generally any act which puts the insured to expense or trouble, and justifies him in the belief that the insurers regard the policy as still a valid contract.¹ So, if the insurers lead the insured into an infraction of some condition.²

And *vice versa*, if the insured accepts a policy, and pays the premium, with knowledge that false representations have been made to him to induce him to accept, he cannot afterwards set up those false representations in defence to an action on the premium note.³

¹ *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Penn Fire Ins. Co. v. Kittle*, 39 Mich. 51. In *Phoenix Ins. Co. v. Stevenson* (Ky.), 8 Ins. L. J. 922, it is said that unreasonable delay in notifying a purpose to claim a forfeiture, as it may lull the insured into a false security, and prevent his obtaining new insurance, will amount to a waiver.

² *Leslie v. Knickerbocker Ins. Co.*, 5 T. & C. (N. Y.) 193. A warranty does not cover patent and obvious defects, which are plainly visible to the warrantee, — such, for instance, as the loss of an eye in a horse. This doctrine is based upon the reasonable presumption that the parties could not have intended to affirm that to be true which they both knew to be false. *Brown v. Bigelow*, 10 Allen (Mass.), 242; *American Ins. Co. v. Mahone*, 21 Wall. (U. S.) 152.

³ *Lycoming Ins. Co. v. Woodworth*, 83 Pa. St. 223. In *Carr v. London & North Western Railway Company*, L. R. 10 C. P. 307, the following were laid down as recognized propositions, with respect to an estoppel *in pais*, by Lord Justice Brett: —

1. If a man by his words or conduct wilfully endeavors to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such a state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.

2. If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it is acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

3. If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act that way to his damage, the first is estopped from denying that the facts were as represented.

4. If in the transaction itself which is in dispute one has led another in the belief of a certain state of facts by conduct or culpable negligence calculated to have that result, and such culpable negligence has been the cause of leading, and has led, the other to act by mistake on such belief to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist.

[Waiver may be a question for the court, if the facts are not in dispute.¹ Otherwise it is for the jury.² Facts relied on as constituting a waiver must be pleaded. If waiver is not pleaded it is error to instruct the jury as though such an issue were in the case.³]

§ 498. **Estoppel by Act of Agent.**—Prior to the case of *Plumb v. Cattaraugus County Mutual Insurance Company*,⁴ the rule in that State had been that statements in the application which were referred to and made part of the policy were warranties, a breach of which worked a forfeiture, whether the application was made and signed by the applicant, or, at his request, filled up by an agent of the company authorized to receive and forward applications, and then signed by the applicant. But in that case the rule was changed upon the following facts: The agent and surveyor of the company presented to the plaintiff a blank application, and solicited him to effect an insurance in the company for which he acted. After some hesitation the plaintiff told the agent that if he insisted upon taking the application that day, he must get along alone, and act on his own responsibility. Whereupon the agent proceeded to make the survey alone; and having filled up the application, presented it to the plaintiff with the assurance that it was all right, and just as it should be, who thereupon, stating that he relied upon this assurance, signed it. It appeared, however, that there were material misstatements in the survey as to the relative distances and positions of surrounding buildings. Under these circumstances the court held that it was a case for the application of the doctrine of estoppel, and that, since the agent acted within the

A fifth rule was added to these, in *Ex parte Adamson*, by Lord Justice James, 8 Ch. D. 807, 817.

5. Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he had said or done, or omitted to say or do.

¹ [*New Orleans Ins. Ass. v. Matthews*, 65 Miss. 301.]

² [*Drake v. Farmers' Union Ins. Co.*, 3 Grant's Cas. 325 at 326.]

³ [*Eiseman v. Hawkeye Ins. Co.*, 74 Iowa, 11.]

⁴ 18 N. Y. 392.

scope of his authority, what he had, with a full knowledge of the facts, asserted to be true, the company could not be allowed to prove to be false, for the purpose of showing a breach of the warranty. And the doctrine of this case was subsequently affirmed in the case of *Rowley v. Empire Insurance Company*,¹ where the agent was empowered, among other things, "to take applications." The plaintiff stated verbally to the agent the facts necessary to meet the requirements of the company, and among other things that the property was incumbered by mortgage, and then signed the application, which the agent proceeded to fill up on his return to his residence. In it, however, he stated that there was no incumbrance on the property; and the falsity of this statement the insurers sought to show in order to defeat a recovery. But the court held that they were estopped from so doing. A party who deals with an agent, through whom he applies for and obtains a policy, has a right to presume that such material facts as are made known to him are known to his principal, and when policies are issued with a full knowledge of such facts, the insured is to suffer no prejudice, nor are the insurers to gain any advantage by insisting upon conditions which it would be dishonest to enforce.² The doctrine of these cases has been made the subject of statutory enactment in Maine, whereby such statements are made conclusive upon the company when the application is drawn up by the agent who knows the facts.³

¹ 36 N. Y. (9 Tiff.) 550. See also *Owens v. Holland, &c. Ins. Co.*, 56 N. Y. 565.

² *Security Ins. Co. v. Fay*, 22 Mich. (4 Clarke) 467, 473; *Ætna Live Stock & Fire Ins. Co. v. Olmstead*, 21 Mich. (3 Clarke) 246; *North Am. Fire Ins. Co. v. Throop*, id. 146; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *Knox v. Lycoming Ins. Co.* (Wis.), 10 Ins. L. J. 89.

³ Stat. 1861, c. 34, § 2. By that statute it is enacted that "no insurance company shall avoid payment of a loss by reason of incorrect statements of value, or title, or erroneous description by the insured in the contract of insurance, if the jury shall find that the difference between the property as described and as really existing did not contribute to the loss, or materially increase the risk; any change in the property insured, its use or occupation, or breach of any of the terms or conditions of the contract by the insured, shall not affect the contract, unless the risk was thereby materially increased."

§ 499. And the Supreme Court of the United States has at last thrown the great weight of its authority into the scale in favor of this doctrine of equitable estoppel,¹ the elasticity of which it must be admitted has been put to the test of the severest tension. But to this the courts seem to have been driven by the constantly increasing tendency of insurance companies to seek profit at the expense of the unwary, and protection against sharp, not to say dishonest, practices, by invoking another rule of law,—that parol evidence is inadmissible to contradict or vary the terms of a written contract,² — which was intended to prevent fraud and not to work injustice. In that case the court say : —

“ In the case before us, a paper is offered in evidence against the plaintiff, containing a representation concerning a matter material to the contract on which the suit is brought, and it is not denied that he signed the instrument, and that the representation is untrue. But the parol testimony makes it clear, beyond a doubt, that this party did not intend to make that representation when he signed the paper, and did not know he was doing so ; and, in fact, had refused to make any statement on that subject. If the writing containing this representation had been prepared and signed by the plaintiff in his application for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself, or by some one who was his agent alone in the matter, and forwarded to the principal office of the defendant corporation, and acted upon as true by the officers of the company, it is easy to see that justice would authorize them to hold him to the truth of the statement ; and that as they had no part in the mistake which he made, or in the making of the instrument which did not truly represent what he intended, he should not, after the event, be permitted to

¹ *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222.

² This rule is not applicable at all unless the application is made part of the contract. *Cheever v. Union Central Ins. Co.* (Superior Ct. Cincinnati), 5 Big. Life & Acc. Ins. Cas. 458. That the rule is not infringed, see *ante*, § 144 ; *Insurance Co. v. Mahone*, 21 Wall. (U. S.) 152 ; *McLean v. Piedmont, &c. Ins. Co.*, 29 Grat. (Va.) 361.

show his own mistake or carelessness to the prejudice of the corporation.

“ If, however, we suppose the party making the insurance an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it ; and yet, knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is, that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract ; and that it was made by the defendant, who procured the plaintiff’s signature thereto.

“ It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels ; or, as it is sometimes called, estoppels *in pais*. The principle is, that where one party has, by his representations or his conduct, induced the other party to a transaction to give him an advantage which it would be against equity and conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood, and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country.” ¹

¹ *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392 ; *Rowley v. Empire Ins. Co.*, 36 id. 550 ; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 526 ; *Combs v. Hannibal Savings & Ins. Co.*, 43 Mo. 148 ; *North American Fire Ins. Co. v. Throop*, 22 Mich. 146 ; *Michigan St. Ins. Co. v. Lewis*, 30 id. 40 ; *ante*,

§ 500. **Estoppel ; Misrepresentation ; Agency.** — In *Sparrow v. Mutual Benefit Life Insurance Company*,¹ the validity of the policy was made dependent upon the truth of the answers to the inquiries contained in the application ; and the insured was inquired of in the same interrogatory as to prior insurance, other insurance, and also if he had insurance upon his life in other companies, in what companies, and to what amount. The answer was, "Yes ; 5000, under policy 17,990." It appeared in evidence that the insurers, a New Jersey corporation, had a general agent in Boston for Massachusetts, who had supervision over the other agencies within the State, and appointed sub-agents, whose duty it was to submit to applicants for insurance certain questions, and to see that they were answered. This sub-agent solicited the insured, at the place of business of the latter, to make application for insurance, and took down from the dictation of the insured all of the answer except the number of the policy, which was inserted by the clerk of the sub-agent at the latter's direction, the information having been obtained from the records in the office, and all having been done after the signature of the insured was made to the application. The answer was untrue as to the amount of other insurance, and incomplete as to the offices in which it was placed. It was held to be a question of fact for the jury as to each particular act in the negotiation, whether the agent, who might be acting now for the company and now for the insured, was in fact acting for the one or the other ; and the responsibility of each particular act or declaration would rest with that party for whom the agent acted in the matter and under whose direction and control, as to that particular matter, he might be, adopting and applying the doctrine as laid down in *Union Mutual Insurance Company v. Wilkinson*.² Such an agent

§§ 143, 144; *Ætna Live Stock & Tornado Ins. Co. v. Olmstead*, 21 Mich. 246; *Miller v. Mut. Ben. Life Ins. Co.*, 31 Iowa, 216; *McBride v. Republic Fire Ins. Co.*, 30 Wis. 562; *Miner v. Phoenix Ins. Co.*, 27 id. 693; *Continental Ins. Co. v. Kasey*, 25 Grat. (Va.) 268.

¹ Tried before Shepley, J., in the Circuit Court of the United States, First Judicial District (Massachusetts), April, 1873, and not yet reported.

² 13 Wall. (U. S.) 222; *ante*, § 144.

is not necessarily the agent of the insurers in every act, because he may be controlled and directed in the particular matter by the insured, when of course he is the agent, *pro hac vice*, for the insured. But where such an agent by his advice, opinion, or otherwise, acting within the general sphere of his duties, leads, directs, or controls the assured, he is the company's agent, and they are bound by his acts and their results. And in the same case where the answer, in the making of which the agent of the company intervened, was untrue and incomplete, the defendant requested the court to instruct the jury that if the insured accepted the policy, with the knowledge that the answers to the several questions were as they appeared at the trial, he was bound by them, whatever knowledge the agent of the company might have had from him, or from any other person, relating to the subject-matter inquired about. But the court declined to so instruct, without qualification, but did instruct that if the insured accepted the policy with the knowledge that the answers were in the words as they appeared at the trial, that those words could not be altered or changed, or their meaning altered or changed by the introduction of parol evidence, and that although the agent of the company was aware from other sources that the answers were untrue, yet if they were knowingly made by the insured and adopted by him, and their truth made the test of the validity of the policy, he was bound by them. But there was a clear distinction between words used in the request as to matters which would conclude the insured, and as to matters which would estop the office. If the insured adopts the particular answer, he is concluded from saying that the words used mean anything different from what they purport to. But the question as to what concludes the insured is not to be confused with the question as to what estops the office. These are entirely distinct and separate. The office, for instance, presents a question having two clauses. Both are answered with equal truth and fulness. With regard to one clause, the answer is put down and adopted and signed by the assured. With regard to the other, the office puts down but a part of the answer. While

the insured is concluded as to the first, yet when the company defends upon the ground that the answer to the second is not true and full, the insured may be allowed to reply that he did say something in reply to the interrogatory which the insurers did not put down, because they regarded it then as immaterial. And although in the light of subsequent events it proves to have been material, yet as the insurers determined to omit it, it was their act and not his, and so they shall not be allowed to set it up against him. The questions, whether a party insured is concluded by an answer which he has adopted, and whether the insurers are estopped from setting up some imperfection in an answer, for which they are directly responsible, are entirely distinct. And this distinction is the foundation of the doctrine laid down in the *Union Mutual Life Insurance Company v. Wilkinson*,¹ under which parol evidence is allowed, not to vary or change the language as it is, but to show that the party claiming to set up an omission or modification is in such a condition that he cannot set it up by reason of his own knowledge of his own acts.

§ 501. **Estoppel where Facts arise pending Negotiations.** — This estoppel is oftenest based on matter arising pending the negotiation, as where the amount of the risk taken is beyond the limit prescribed by the charter;² or a special risk prohibited by the by-laws is taken;³ or prepayment of premium, though by the terms of the policy made essential to its validity, is not insisted on;⁴ or an incomplete answer, or no an-

¹ 13 Wall. (U. S.) 222.

² *Hoxsie v. Prov. Mut. Fire Ins. Co.*, 6 R. I. 517; *Fuller v. Boston Fire Ins. Co.*, 4 Met. (Mass.) 206; *Cumberland Valley Mut. Prot. Ins. Co. v. Schell*, 29 Pa. St. 31; *ante*, §§ 130, 131. But see *post*, § 510.

³ *Merch. & Manuf. Ins. Co. v. Curran*, 45 Mo. 142.

⁴ *Sheldon v. Atlantic Fire & Mar. Ins. Co.*, 26 N. Y. 460; *Heaton v. Manhattan Fire Ins. Co.*, 7 R. I. 502; *Kibbe et al. v. Travellers' Ins. Co.*, N. Y. Supreme Ct., 1872, not yet reported; *ante*, §§ 134, 135. [When the policy contained a clause stating that the company would not be liable until premiums should be actually paid, but the agent had delivered the policy to the assured waiving prepayment and fixing no time for payment and further had demanded payment several times at the last of which, the assured promised to pay in a few days and when the policy was not cancelled nor was the assured notified that it

swer at all, to a question in the application;¹ or the insurers issue or renew a policy after notice that the statements in the application are untrue;² or that the original policy was forfeited by other insurance without notice;³ or that the location of the property has been changed;⁴ or that the insured resided in a prohibited district.⁵ Notice which is sufficient to excite attention, and put a party on his guard, and call for inquiry, is notice of everything to which such inquiry might

would be, it was held that a waiver of payment had been made and that the company was liable. *Washoe Tool Manuf. Co. v. Hibernia Fire Ins. Co.*, 66 N. Y. 613 at 614.]

¹ *Hall v. People's Mut. Ins. Co.*, 6 Gray (Mass.), 185; *Blake v. Exchange Mut. Ins. Co.*, 12 id. 265; *Liberty Hall Ass. v. Housatonic Mut. Fire Ins. Co.*, 7 id. 261; *Nichols v. Fayette Mut. Fire Ins. Co.*, 1 Allen (Mass.), 63; *Geib v. Enterprise Ins. Co.*, 1 Dillon (U. S. C. Ct.), 443, 449; *Lorillard Fire Ins. Co. v. McCulloch*, 21 Ohio St. 176. [If the company issues a policy on an application containing an ambiguous answer, it waives a breach arising from a possible construction of the answer. *Lebanon Mut. Ins. Co. v. Kepler*, 106 Pa. St. 28. If a question in the application is not answered at all, or on its face is imperfectly answered, the issue of a policy without further inquiry is a waiver of the want or imperfection of the answer. *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183. In this case one of the questions was, "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now insured on the life of the party and in what companies?" Answer, "\$10,000, Equitable Life Assurance Society." A policy in that company was in fact the only other existing insurance, but no mention was made of unsuccessful applications which the question called for and which the answer manifestly did not touch. An omission to answer a question will not be imputed to fraud, a subsequent issue of a policy amounts to omitting the question from the application altogether. *Conn. Mut. Life Ins. Co. v. Luchs*, 108 U. S. 498; *Armenia Ins. Co. v. Paul*, 91 Pa. St. 520 at 522; *Dunbar v. Phenix Ins. Co.*, 72 Wis. 492; *Carson v. Jersey City Ins. Co.*, 43 N. J. 300; *Jersey City Ins. Co. v. Carson*, 44 N. J. 210. But where a policy requires a statement of the true interest of the insured, if the same is not absolute, the acceptance of the policy without any declaration of title amounts to a representation that it is absolute. *Lasher v. St. Joseph Fire & Mar. Ins. Co.*, 86 N. Y. 423. Where the assured forgets to fully state the status of surrounding buildings in his application, but afterwards informs the agent of the company of the same and is told that it is all right, the breach is waived and cannot be set up as a defence. *Farmers' & Mer. Ins. Co. v. Chesnut*, 50 Ill. 111.]

² *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Home Mut. Fire Ins. Co. v. Garfield*, 60 Ill. 124.

³ *Carroll v. Charter Oak Ins. Co.*, 38 Barb. (N. Y.) 402.

⁴ *Ludwig v. Jersey City Ins. Co.*, 48 N. Y. 379.

⁵ *Garber v. Globe Ins. Co.*, C. Ct. (Mo.) 4 Ins. L. J. 307.

have led, as of a change of business on an application for a renewal of a policy where the agent of the applicant states his belief of the fact of a change, and refers to a certain person for information,¹ or misleads the insured in the very matter of supplying the information upon which the application is filled up.² [If the company knows certain facts at the time of insurance it cannot forfeit the policy on the ground of the existence of such facts although the insured stated that they did not exist.³ If the general agent knows at the time of insurance that petroleum is kept or used on the premises, the condition against it is waived.⁴ But the issue of a policy with knowledge of the facts as to the interest of the assured does not estop the company from setting up the defence of no insurable interest.⁵ If the company is estopped to take advantage of a mistake in the *age* of the insured, the verdict should be for the amount which the premium would insure at the actual age.⁶]

§ 502. **Estoppel where Facts arise during the Currency of the Policy.** — It nevertheless not unfrequently takes place where the facts upon which it is based arise after the negotiations have been completed, and during the currency of the contract; as where an assignment is assented to, or premiums received,⁷

¹ Reynolds v. Commercial Fire Ins. Co., 47 N. Y. (Com. of App.) 559.

² Sweeney v. Promoter Life Ass. Co., 14 Irish Com. L. 476.

³ [Schwarzbach v. Protective Union, 25 W. Va. 624, 665.]

⁴ [Kruger v. Western Fire & Mar. Ins. Co., 72 Cal. 91.]

⁵ [Spare v. Home Mut. Ins. Co., 12 Ins. L. J. 365, 22 Am. L. Reg. N. S. 409, (Or.) 1883.]

⁶ [Epes v. Arlington Ins. Co. (Va.), 8 Ins. L. J. 342.]

⁷ [After full knowledge of facts receipt of an *after-maturing* premium or assessment or other act recognizing the policy is a waiver. Schimp v. Cedar Rapids Ins. Co., 124 Ill. 354; Masonic Mut. Ben. Ass. v. Beck, 77 Ind. 203; Jordan v. State Ins. Co., 64 Iowa, 216; Germania Ins. Co. v. Rudwig, 80 Ky. 223 (removal); Story v. Hope Insurance Co., 37 La. Ann. 254; Carpenter v. Continental Ins. Co., 61 Mich. 635; King v. Council Bluffs Ins. Co., 72 Iowa, 310 (policy renewed after general agent knew that buildings had been erected near the one insured); Harl v. Pottawattamie County Mut. Fire Ins. Co., 74 Iowa, 39 (a company demanding and receiving an assessment from the administrator cannot afterwards claim that the fire policy ceased with the life of the insured); Phoenix Ins. Co. v. Lansing, 15 Neb. 494 (acceptance of over-due premium); Schoneman v. Insurance Co., 16 Neb. 404 (same). See also Western Ins. Co. v. Scheidle, 18 Neb. 495; McCluer v. Home Ins. Co., 31 Mo. App. 62 (error not to

or assessments¹ are made and collected on a premium note, or dividends paid, or a renewal premium is received, or a change

submit to the jury the question of waiver by adjustment after loss during default of premium); *Penn Fire Ins. Co. v. Dougherty*, 102 Pa. St. 568; *Liverpool, &c. Ins. Co. v. Ende*, 65 Tex. 118 (agent received premiums after knowing that insured was not sole owner); *Morrison v. Wis. O. F. Mut. Life Ins. Co.*, 59 Wis. 162; *Osterloh v. New Denmark M. H. Fire Ins. Co.*, 60 Wis. 126; *Schwarzbach v. Protective Union*, 25 W. Va. 624, 666; *Millard v. Supreme Council of Am. L. of Honor*, 81 Cal. 340. Where the company has by its conduct induced a belief that an existing cause of forfeiture will not be acted on, and acting on this belief has paid subsequent premiums, the company is estopped. *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487. If after knowledge of the facts constituting a breach of condition the company's agent says there will be no more trouble and that the money will be paid in case of loss, and relying on this the plaintiff pays the premiums as they come due, the company is estopped. *Ferguson v. Mass. Mut. Life Ins. Co.*, 32 Hun, 306. An agent to procure applications, deliver policies, and collect premiums in a certain territory, may waive a cause of forfeiture by the receipt of premiums after he knows of it, *Smith v. St. P. Fire & Mar. Ins. Co.*, 3 Dak. 80, although the policy declares that agents are not authorized to waive forfeitures. His knowledge is that of the company. So where the agent saw liquors sold in a grocery insured, drank some himself and afterward delivered the policy, and received premiums, the policy could not be avoided for breach of the condition against sale of liquor, *McGurk v. Metropolitan Life Ins. Co.*, 56 Conn. 528. But although the receipt with knowledge of a premium maturing after the breach of condition is a waiver, it is otherwise, in regard to a premium due before breach and for which credit was given. For example, where a premium note was given payable one year from date or at the date of any loss under the policy, that might sooner occur, and a loss occurred against which the company had a complete defence for conditions broken, it was held that receiving payment of the note was no waiver. *Schimp v. Cedar Rapids Ins. Co.*, 124 Ill. 354. So if the assured pays it with full knowledge that the company does not intend to waive the breach and only in order to keep the policy alive, so that it will revive when the breach ceases, there is no waiver. *Northwestern Mut. Life Ins. Co. v. Amerman*, 119 Ill. 329. Receiving premiums through an agent, with knowledge of the facts, estops the company from denying the agent's authority, *Northwestern Iron Co. v. Aetna Ins. Co.*, 26 Wis. 78, or that the policy did not cover the special property in question, *Block v. Columbian Ins. Co.*, 42 N. Y. 393.]

¹ [Collection of an assessment after knowledge of a breach of condition is a waiver. *Lycoming Mut. Ins. Co. v. Stocklohn*, 3 Grant's Cas. 207 at 208 (insurance beyond two-thirds value); *Insurance Co. v. Stockbower*, 26 Pa. St. 199, 202. A certificate cannot be treated as valid for the purpose of assessment and invalid for the purpose of avoiding payment to the beneficiaries. *Malt v. Rom. Cath. Mut. Prot. Soc.*, 70 Iowa, 455. Receipt of an assessment overdue has been considered a waiver though it was by mistake, and the company did not intend to waive. *Bailey v. Mut. Ben. Ass.*, 71 Iowa, 689, 690; *Tobin v. Western Mut. Aid Soc.*, 72 Iowa, 261. Where G. a married woman separated from her hus-

in the risk is permitted, or the last of several conveyances has been assented to, or the insured is misled by the agent into neglect to give notice of a change of risk, or consent to a renewal,¹ and continuance is given, after knowledge, actual or constructive, of a breach of a condition of the policy.² "The defendants," said the court, in *Frost v. Saratoga County Mutual Insurance Company*,³ "with full knowledge of the facts invalidating the policy, have chosen to act upon the premium note of the plaintiff, as an available security in their favor, and which he was bound to pay. Several sums have accordingly been assessed by the directors of the company, and payment thereof required on said note. These payments have been made by the plaintiff, and the question is presented, Can the

band, representing that she was a widow and obtained a policy which she assigned to F., and F. not knowing of G.'s misrepresentation went to the secretary to ask if G.'s husband could prevent the operation of the assignment, and the secretary referred F. to a clerk, who told her that the husband could not interfere, it was held that this was notice to the company that G. had a husband, and that by receiving assessments afterward, the right to avoid the policy was waived. *Fitzpatrick v. Hartford Life & Ann. Ins. Co.*, 56 Conn. 116.]

¹ [A renewal of a policy by the agent, with knowledge of a change in the title which would be a breach of a condition in the policy, is a waiver of the same. *Mechler v. Phoenix Ins. Co.*, 38 Wis. 665 at 671; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361 at 367 (incumbrance).]

² *Insurance Co. v. Slockbower*, 26 Pa. St. 199; *Buckley v. Garrett*, 47 id. 204; *Keenan v. Dubuque Mut. Fire Ins. Co.*, 13 Iowa, 375; *North Berwick Co. v. New England Fire & Mar. Ins. Co.*, 52 Me. 336; *Tuttle v. Robinson*, 33 N. H. 104; *Frost v. Saratoga Mut. Ins. Co.*, 5 Denio, 154; *Cumberland Valley Mut. Prot. Ins. Co. v. Mitchell*, 48 Pa. St. 384; *Hodsdon v. Guardian Life Ins. Co.*, 97 Mass. 144; *Bevin v. Conn. Mut. Life Ins. Co.*, 23 Conn. 244; *Supple v. Cann*, 9 Irish Law, n. s. 1265; *Wing v. Harvey*, 2 De G., M. & G. 265; s. c. 27 Eng. L. & Eq. 140; *Hale v. Union Mut. Fire Ins. Co.*, 32 N. H. 295; *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523; *Williams v. Canada, &c. Ins. Co.*, 27 U. C. (C. P.) 119; *Smith v. Mutual Ins. Co.*, id. 441; *Dickson v. Provincial Ins. Co.*, 24 id. 157; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Carroll v. Charter Oak Ins. Co.*, 38 Barb. (N. Y.) 402; s. c. 10 Abb. Ct. of App. Dec. 316; *New England, &c. Ins. Co. v. Wetmore*, 32 Ill. 221; *Rathbone v. City Fire Ins. Co.*, 31 Conn. 193; *Southern Life Ins. Co. v. McCain*, 96 U. S. 84; *Anson v. Winnesheik Ins. Co.*, 23 Iowa, 84. See also *ante*, § 339; *post*, § 502; *Maryland Fire Ins. Co. v. Gusdorf*, 43 Md. 506; *Law v. Hand-in-Hand Ins. Co.*, 29 U. C. (C. P.) 1; *Gilliat v. Pawtucket, &c. Ins. Co.*, 8 R. I. 282; *Kreutz v. Niagara Ins. Co.*, 16 U. C. (C. P.) 131; *Armstrong v. Turquand*, 9 Irish L. (C. P.) 32; *Coombs v. Shrewsbury Mut. Fire Ins. Co.*, N. J. (Ch.), 23 Alb. L. J. 98.

* 5 Denio (N. Y.), 154.

defendants, who have thus affirmed the original and continuing validity of the premium note, in which the plaintiff has fully acquiesced, be allowed to set up that this policy, which formed the only consideration of the note, was never valid, and that on the sole ground of a breach of warranty on the part of the plaintiff, the facts constituting such breach of warranty being as well known to the defendants when they exacted and received payments on the note as they are at the present time? This is the point to be determined, and I should certainly with great reluctance come to the conclusion that the defendants can be allowed to occupy the position they now assume. It is wholly inconsistent with the ground taken by them when they called for payments on the premium note, and I think common justice forbids any change of position in this respect. 'It is a question of ethics,' as was said in *Dezell v. Odell*,¹ and morality requires that these defendants shall be held strictly to the ground that they have chosen to assume for themselves. An estoppel, according to Lord Coke, is where 'a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.'² Estoppels are of three kinds: by matter of record, by deed, and *in pais*; but our present concern is with the latter class only. Such an estoppel arises when one person is induced by the assertion of another to do that which would be prejudicial to his own interest, if the person by whom he had been induced to act in this manner was allowed to contradict and disprove what he had before affirmed. In the case of *Pickard v. Sears*,³ the principle is thus stated by Lord Denman: 'The rule of law is clear, that when one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.' In the case of *Dezell v. Odell*,⁴ Cowen, J., said: 'We then have a clear case of an admission by the defendant intended to influence the con-

¹ 3 Hill, 215, 225.

² Co. Lit. 352 a.

³ 6 A. & E. 469.

⁴ *Supra*.

duct of the man with whom he was dealing, and actually leading him into a line of conduct which must be prejudicial to his interest, unless the defendant be cut off from the power of retraction. This I understand to be the very definition of an estoppel *in pais*.¹ The estoppel is allowed to prevent fraud and injustice, and exists whenever a party cannot in good conscience gainsay his own acts or assertions. The authorities upon this point are numerous, and all speak the same language.¹ 'It makes no difference, in the operation of this rule, whether the thing admitted was *true* or *false*, it being the fact that it has been acted upon that renders it conclusive.'² Here the defendants, in affirming the validity of the premium note, necessarily affirmed that the policy was also originally valid. This affirmation was acted upon by the plaintiff, for he advanced money in consequence of its being made, and the defendants shall not now be allowed to set up any fact *dehors* the policy in order to impeach the original validity of the contract of insurance. *Qui sentit commodum, sentire debet et onus*." So if after knowledge of other insurance the insurers say it will make no difference, and so lead the insured to still rely upon his policy as a valid policy.³ But a demand for an assessment not complied with, and not pressed, as having been made by mistake, is no waiver.⁴ [Any agreement, declaration, or action by the company which induces the assured honestly to believe that a deviation from the strict letter of the policy will not incur a forfeiture estops the company; for example, a course of dealing authorizing the assured to believe that premiums will be received within a reasonable time after they come due.⁵ If

¹ Gregg v. Wells, 10 A. & E. 90; Coles v. Bank of England, id. 437; Sandys v. Hodgson, id. 472; Stephens v. Baird, 9 Cowen (N. Y.), 274; Welland Canal v. Hathaway, 8 Wend. (N. Y.) 480; 2 Smith, Lead. Cases, 458, 467, notes; 1 Greenl. Ev. §§ 22, 27, 204, 207.

² Ib. §§ 208, 209.

³ Westchester Fire Ins. Co. v. Earle, 33 Mich. 143. See also St. Paul, &c. Ins. Co. v. Wells, 89 Ill. 82.

⁴ Elliott v. Lycoming County Mut. Ins. Co., 66 Pa. St. 22.

⁵ [Piedmont, &c. Life Ins. Co. v. Fitzgerald, 1 Tex. Civ. Cas. §1347; Insurance Co. v. Eggleston, 6 Otto, 572; Insurance Co. v. Wolff, 5 Otto, 330; Bergmann v. St. Louis Life Ins. Co., 2 Mo. App. 262 at 264.]

the company knowing the facts that constitute a forfeiture continue to treat the contract as binding, thereby inducing the insured to act and incur expense, the forfeiture is waived.¹ Where a policy was written on a "frame dwelling-house," and the insured afterward applied for and obtained from the secretary permission to remove the floor, raise the ceiling, etc., of the "saloon," it was held that the company had waived the provisions in regard to saloon risks. Any negotiation or recognition of the policy, after knowledge of forfeiture, waives it.² A subsequent promise of an insurance company to pay a loss removes their defence that a building near plaintiff's house was not mentioned in the policy, which would otherwise have vitiated it, when the said plaintiff stated such omission to the company's duly authorized agent immediately after the issuance of the policy, and was told in reply that it was all right and also removes their defence that plaintiff's suit was not brought within a year from loss as required.³ The courts will find a waiver on slight evidence for they lean to defeat forfeitures.⁴

§ 502 a. **Waiver ; Notice ; Option.** — Where notice is required and given, or though not required is actually given, of an act or omission, which may work a forfeiture, in order that the insurer may take some action or exercise some option in his own interest relative thereto, the forfeiture will be waived if that action be not taken or that option be not exercised, and made known to the holder of the policy, or done in such manner that it may be known to him on proper inquiry, within reasonable time and before any other act recognizing the continued validity of the policy.⁵ This was held to be the rule where the policy provided for a forfeiture, and immediately following provided that the policy might be terminated at any

¹ [Hollis v. State Ins. Co., 65 Iowa, 454.]

² [Haas v. Montauk Fire Ins. Co., 49 Hun, 272 ; Ring v. Windsor Co. Mut. Fire Ins. Co., 54 Vt. 434.]

³ [Fire & Mar. Ins. Co. v. Chesnut, 50 Ill. 111.]

⁴ [Bonenfaut v. Insurance Co., 76 Mich. 653.]

⁵ Potter v. Ontario, &c. Ins. Co., 5 Hill (N. Y.), 147 ; Allen v. Massasoit Mut. Ins. Co., 99 Mass. 160, 161 ; Anson v. Winneskeik Ins. Co., 23 Iowa, 84 ; Guernsey v. Am. Ins. Co., 17 Minn. 104.

time, at the option of the company, on notice.¹ The fact that the insurers do not avail themselves of the right to cancel a policy, which for any cause known to them they have a right to treat as forfeited, is evidence of a waiver of forfeiture by reason of that cause.² So where a practice, as of the time, place, or manner of receiving premiums, has been changed, notice should be given of the change before the option can be exercised.³

§ 503. **Estoppel if what is undertaken by the Insured is known by the Insurer to be impossible.** — So if a policy be issued, or a contract of insurance made, under such circumstances that it is known to the insurers that the conditions of the policy, as to the payment of the premiums, will not, because they cannot, be complied with, this will be deemed a waiver of such conditions, and an estoppel against setting up a non-compliance therewith as a defence, as appears by a very recent case in the Circuit Court of the United States for the District of California.⁴ The San Francisco agent of a New York company forwarded an application, dated June 5, 1867, reciting that if the application was accepted the policy was to be in force from that date. The application was accepted, and a policy, dated April 5, 1867, was issued, reciting that the quarterly premiums were due on or before the sixth days of April, July, October, and January, and providing that if not paid on or before said days, “at the office in New York (unless otherwise expressly agreed in writing), or to agents, when they produce receipts signed by the president or secretary,” it was to be void. The time of passage between San Francisco and New York was then from twenty-three to thirty days, and the

¹ *Wakefield v. Orient Ins. Co.* (Wis.), 11 Repr. 655.

² *Teutonia Life Ins. Co. v. Anderson*, 77 Ill. 384; *Mutual Benefit Life Ins. Co. v. French*, 30 Ohio St. 240; *Georgia Mut. Life Ins. Co. v. Gibson*, 52 Ga. 640; *Joliffe v. Madison Ins. Co.*, 39 Wis. 111; *Comp. du Phœnix c. Dohis, Dallos*, Jur. Gén., 1844, 4, 36.

³ *Mutual Benefit Life Ins. Co. v. French*, 30 Ohio St. 240; *Seamans v. North Western Ins. Co.*, C. Ct. (Minn.), 10 id. 153.

⁴ *Young v. Mut. Life Ins. Co. of New York*, C. Ct. (Cal.), 2 Ins. L. J. 289. See also *Andes Ins. Co. v. Shipman*, 77 Ill. 189.

policy arrived at San Francisco August 2, 1867. And hereupon the court observes: —

“ The policy bears date April 5th, and the receipts prepared by the company correspond with this date. The company, therefore, regarded the second quarter’s premium as due July 6th, and acted upon that idea, although the application was made, and the first memorandum receipt and contract given, on June 5th. The promissory note given for the first quarter’s premium being payable without grace, fell due August 4th. It will be seen that the condition of the policy imposing a forfeiture required payment to be made ‘at the office of the company *in the city of New York*, or to agents, *when they produce receipts signed by the president or secretary*, unless otherwise expressly agreed in writing.’ There is no evidence in this case of its having been otherwise agreed in writing. It does not appear that the policy was received at the San Francisco office before the 2d of August. At or about the 6th of July the policy must have been in the defendant’s office in New York, which would have given twenty-seven days to August 2d, to make the passage to San Francisco. The defendant knew at the time of despatching the policy that the second instalment of premium had *not* been paid *at the office in New York*. It also knew that it *could not be paid to its agents here*, in accordance with the terms of the contract, so as to be obligatory upon defendant, for the reason that the *only receipt duly signed as specified in the policy* authorizing payment to its agents was attached to the policy, and would not reach San Francisco till the month of August, a month after it was due. The defendant did not expect payment at its office in New York City, or it would not have sent its receipt to its agent to enable him to receive payment. The defendant, then, by its officers in New York, transmitted the policy and receipts, with knowledge that payments had not and would not be made at the office in New York, and that it *could not be made elsewhere* in the mode required by the terms of the contract for a month after due. Yet the policy was sent with an intent that it should be delivered, and payment received by its agent in San Francisco, although it knew that

there must necessarily be a forfeiture upon the strict letter of the contract. Also, after the receipt of the policy at San Francisco, on the 2d of August, nearly a month after the instalment fell due, according to the terms of the policy, the defendant's agent, necessarily knowing that payment had not been made, stamped and countersigned the receipt, ready for delivery upon payment, thereby treating the agreement as still in force. Again on the 8th of August, four days after the note given for the first quarter's premium fell due, and after default in payment, and necessarily with the knowledge of non-payment of both the note and second instalment, the agent of the defendant addressed to Young the note before set out in this opinion.¹

“This act, after the forfeiture, if any there was, had attached, recognizes the agreement as being still in force. The letter does not even demand payment, or refer to the fact of non-payment, or fix any time when the insured should call for the policy or make payment. It simply notifies him that his policy has arrived, and asks whether it should be sent to him at Vallejo, or whether he would call and get it when in the city, implying that it would be at his option to have it sent to him at once, or wait his convenience till he should come to the city and be able to call for it. The defendant manifested no haste or anxiety upon the subject, for the policy was on hand from the second to the eighth of August at least, before the notice to Young was even written, and it does not appear when it was sent. It does not appear that this or any other notice reached him. No other act of the company is shown inconsistent with this action, or tending in the slightest degree to show an intention to insist upon a forfeiture till after the death of Young, when the policy was cancelled, October 31st, payment of the loss having before been refused. It could

¹ SAN FRANCISCO, Aug. 8, 1867.

M. P. YOUNG, Esq., Vallejo, Cal.

Dear Sir,—Your policy of insurance with the Mutual Life Insurance Company has arrived. Please inform me whether I shall send it to you at Vallejo, or if you will call and get it when you are in the city.

Respectfully yours,

H. D. HOMANS, *General Agent.*

Per R. W. HEATH, Jr.

hardly have been expected that Young would call to make the second payment until notified whether the risk had been accepted, especially as there was ample time between June 5th, when the application was made, and the 5th of September, the time when the next payment would have fallen due, had the date of the policy agreed with the date of the application, and the preliminary memorandum of agreement given to him by defendant's agent in San Francisco. It was doubtless supposed that notice of acceptance or rejection would be given before the note for the first quarter's premium would fall due. But however this may be, the several acts of the defendant, and all its acts and the acts of its officers in relation to the matter shown to the court, which were performed subsequent to the accruing of the forfeiture, if any accrued, treat the agreement for insurance as still in force. They affirmatively indicate an intention not to insist upon a forfeiture, and had the accident and death not occurred, there can be no doubt, from the facts shown, that even as late as the death of Young the premium would have been received and the policy delivered. In the case cited by counsel of Chipman against the same defendant, tried in this court a year ago, there was no act of any kind shown on the part of the company indicating an intention to waive the forfeiture, or in any way recognizing a subsisting contract. Whereas in this case, all the acts of the company after the forfeiture accrued, and prior to Young's death, shown to the court, recognize the contract as still subsisting, and manifest an intention not to claim a forfeiture.

"I think, upon the facts, the court must find a waiver of any forfeitures which had accrued, and that, under the circumstances, after the death of the assured, it was too late, for the first time, to insist upon the forfeiture."¹

So where it is stipulated that a record shall be kept of the watchman's performance, and it was known to the insurer that such a record could not be kept, the failure to keep it works no forfeiture.²

¹ And see also *Longhurst v. Star Ins. Co.*, *ante*, § 487.

² *Andes Ins. Co. v. Shipman*, 77 Ill. 189. See also *Com. Ins. Co. v. Spankneble*, 52 id. 53.

§ 504. **Estoppel where Facts arise after Loss.**— So also an estoppel arises where the facts arise after a loss, as where an offer of settlement¹ after personal examination by an agent is made, and no compliance has been had with the condition that notice of a loss shall be given forthwith, or a particular statement of loss furnished;² or notice of an election to rebuild after full knowledge that misrepresentations were made at the time of taking out the policy;³ or defective notices, accounts, certificates, or proofs of loss are received without objection, or objections founded on other grounds.⁴ [Where the company knows every fact of avoidance immediately after loss and yet for a year misleads the insured into believing that it means to settle, it cannot complain if it is held estopped.⁵ Statements by a local insurance agent that the plaintiff's loss was "all right" and that the company would pay the amount, constitutes a waiver by the company of the clause in the policy requiring formal proof of loss, and also the one barring suits not

¹ [A known cause of forfeiture is waived even by the agents entering into negotiations for settlement. *Oshkosh G. L. Co. v. Germania Fire Ins. Co.*, 71 Wis. 454. Proceeding to adjust the loss and deal with the insured concerning proofs of loss after knowledge of a breach of warranty, waives it as matter of law. *Marthinson v. North Brit. & Mer. Ins. Co.*, 64 Mich. 372. An adjustment of loss and a promise to pay waive the breach of a condition of the policy if made with full knowledge. *Farmers' & Merchants' Ins. Co. v. Chesnut*, 50 Ill. 111 at 116.]

² *Lycoming County Mut. Ins. Co. v. Schreffler*, 42 Pa. St. 188; *Franklin Fire Ins. Co. v. Updegraff*, 43 id. 350.

³ *Bersche v. Globe Mut. Ins. Co.*, 31 Mo. 546.

⁴ *Bumstead v. Dividend Mut. Ins. Co.*, 2 Ker. (N. Y.) 81; *Francis v. Somerville Mut. Ins. Co.*, 1 Dutch. (N. J.) 78; *Underhill v. Agawam Mut. Ins. Co.*, 6 Cush. (Mass.) 440; *Kernochan v. New York Bowery Fire Ins. Co.*, 17 N. Y. 428; *Priest v. Citizens' Mut. Fire Ins. Co.*, 3 Allen (Mass.), 602; *Lewis v. Monmouth Mut. Fire Ins. Co.*, 52 Me. 492; *Baxter v. Chelsea Mut. Ins. Co.*, 1 Allen (Mass.), 294; *Bartlett v. Union Mar. & Fire Ins. Co.*, 46 Me. 500; *Noyes v. Washington County Mut. Ins. Co.*, 30 Vt. 659; *Connell v. Milwaukie Mut. Fire Ins. Co.*, 18 Wis. 387; *Byrne v. Rising Sun Ins. Co.*, 20 Ind. 103; *Miller v. Eagle Life & Health Ins. Co.*, 2 E. D. Smith (N. Y. Superior Ct.), 268; *Works v. Farmers' Mut. Fire Ins. Co.*, 57 Me. 281; *Turley v. N. A. Fire Ins. Co.*, 25 Wend. (N. Y.) 847; *Rathbone v. City Fire Ins. Co.*, 31 Conn. 193.

⁵ [*Niagara Fire Ins. Co. v. Miller*, 120 Pa. St. 504; *Gans v. St. Paul, &c. Ins. Co.*, 43 Wis. 108 at 114; *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425 at 434; *Insurance Co. v. Slockbower*, 26 Pa. St. 199 at 202.]

brought within one year.¹ Payment of the loss waives a breach of warranty.²]

[§ 504 A. **Refusal to Pay on one Ground waives others ; Demanding Proofs with Knowledge of Forfeiture waives it, Contra.** — The proofs and the limitation that a loss shall not be payable until a certain time after the proofs, are waived, if the company object solely to the amount claimed, and agree to an appraisal and immediate payment.³ An absolute refusal by the insurers to pay the loss waives all irregular preliminaries;⁴ so a refusal on some other specified grounds will waive others.⁵ Demanding proofs waives a misrepresentation or other cause of forfeiture known to the company.⁶ A request for proofs, a statement that they are satisfactory, and a promise to pay the insurance, constitute a waiver of a known cause of forfeiture.⁷ Even though the minds of the parties did not meet at the time of insurance, the building being of wood, but the company believing it to be of brick through mistake caused by the bad penmanship of the insured, the company estopped itself from raising the defence by demanding proofs and submitting to arbitration after knowledge of the facts, obtained three days after the fire.⁸ Promising payment and expressing satisfaction with proofs of loss after knowing of a cause of forfeiture is a waiver.⁹ And without any *demand* if the company *allows* the plaintiff without objection to incur the expense of proofs of loss after it knows of a cause of forfeiture, it is a waiver.¹⁰ But in one case it has been said that although the

¹ [Ide v. Phoenix Ins. Co., 2 Biss. 333, 335.]

² [Nat. Life Ins. Co. v. Minch, 53 N. Y. 144 at 151.]

³ [Snowden v. Kittanning Ins. Co., 122 Pa. St. 502.]

⁴ [Ætna Ins. Co. v. Sparks, 62 Ga. 187 at 195, Code § 2813; Portsmouth Ins. Co. v. Reynolds, 32 Grat. 613 at 629.]

⁵ [German Ins. Co. v. Ward, 90 Ill. 550 at 551; Marston v. Mass. Life Ins. Co., 59 N. H. 92 at 94; Ben Franklin Fire Ins. Co. v. Flynn, 98 Pa. St. 628.]

⁶ [Rockford Ins. Co. v. Travelstead, 29 Ill. App. 654; German Fire Ins. Co. v. Grunert, 112 Ill. 68; La Fonderie v. La Com. d'Ass., 27 L. C. Jur. 194 Q. B.; Cannon v. Home Ins. Co., 53 Wis. 585 at 594.]

⁷ [Silverberg v. Phenix Ins. Co., 67 Cal. 36.]

⁸ [Smith v. City of Lond. Ins. Co., 11 Ont. R. 38 (affirming 15 Can. I. C. R. 69).]

⁹ [Cotton States Life Ins. Co. v. Edwards, 74 Ga. 220.]

¹⁰ [Smith v. St. P. Fire & Mar. Ins. Co., 3 Dak. 80.]

company was orally informed that, in violation of the policy, the insured building was unoccupied at the time of loss, and then demanded proofs of loss as required by the policy, they were held not to have waived the breach; thereby it was the duty of the insured to furnish proofs anyway in pursuance of the conditions of the policy without any request.¹ Asking for proofs of loss and receiving the same, is not a waiver of forfeiture for non-payment of dues. If the mere demand for formal proofs, were such a waiver, the company would have to surrender its right to demand proof if it wished to take advantage of the breach, or at least it would have to inform the insured of its future line of defence. The plaintiff has been put to no burdensome expense, and there is no estoppel.²

§ 505. **What Acts or Omissions amount to an Estoppel or Waiver after Loss.** — The terms “estoppel” and “waiver,” though not technically identical, are so nearly allied, and, as applied in the law of insurance, so like in the consequences which follow their successful application, that they are used indiscriminately by the courts. To constitute a waiver, as of a particular account of loss, or an estoppel against setting up the want of such an account as a defence to an action by the insured to recover a loss, there should be shown some act or declaration by the company during the currency of the time within which the account is required dispensing with it, or some delay or omission to act, from which the insured might reasonably infer that the underwriters did not mean to insist upon it. There is a time when objections in matters of form must be taken. If they are not then made, they never can be made. The law does not say that the procedure is perfect, but that the question is not open. The adherence to, and liberal application of, this principle are necessary to the maintenance of good faith and fair dealing in judicial proceedings.³ Thus the insured is estopped to object to a failure

¹ [Fitchpatrick v. Hawkeye Ins. Co., 53 Iowa, 335 at 340.]

² [Ronald v. Mut. Reserve Fund Life Ass., 23 Abb. N. C. 271. See Phoenix Ins. Co. v. Stevenson, 8 Ins. L. J. 922, and compare Titus v. Glens Falls Ins. Co., 81 N. Y. 410.]

³ Blake v. Exchange Mut. Ins. Co., 12 Gray (Mass.), 265, per Thomas, J.

to bring suit within the time limited, by an offer to pay the loss afterwards,¹ or when such failure is induced by the conduct of the insurers;² or to bringing suit within the time before the expiration of which the loss is not payable, when the insurers deny all liability;³ though it is otherwise if the refusal to pay is conditional, as upon the ground that other suits have been brought against them, and that they will do nothing while these suits are pending.⁴ So parties are estopped from objecting to defective notices, accounts of loss, certificates, and preliminary proofs by an absolute denial of liability; or refusal to pay on the merits of the case;⁵ and by a part payment of the loss,⁶ or a promise to pay it;⁷ or by receiving late proofs without objecting to them as late.⁸ And if the agent of the company, after an examination of the circumstances attending the loss, informs the insured that he cannot recommend the company to pay the loss because it appears by his statements that he had sold more goods than he had purchased, this is a denial of all liability on the part of the company, and a waiver of its right to demand the usual proofs of loss.⁹ And when one defect alone in the proofs is objected to, others are waived.¹⁰ But if the proofs are declared to be defective, the insurers need not go further and specify wherein they are defective, although requested so to do. A reference to the policy for information upon that point will be sufficient to avoid an estoppel or waiver.¹¹ And

¹ *Brady v. West. Ins. Co.*, 17 U. C. (C. P.) 597.

² *Ames v. New York Ins. Co.*, 14 N. Y. 254; *Grant v. Lexington Ins. Co.*, 5 Ind. 23. And see *ante*, §§ 360, 488.

³ *Norwich & N. Y. Transp. Co. v. Western Mass. Fire Ins. Co.*, 6 Blatchf. (U. S. C. Ct.) 241. And see *ante*, § 469, *sub finem*.

⁴ *Ripley v. Ætna Fire Ins. Co.*, 30 N. Y. 136.

⁵ *Norwich & N. Y. Transp. Co. v. Western Mass. Fire Ins. Co.* 6 Blatchf. (U. S. C. Ct.) 241; *Manhattan Fire Ins. Co. v. Stein*, 5 Bush (Ky.), 652; *Francis v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 404.

⁶ *Westlake v. St. Lawrence County Mut. Fire Ins. Co.*, 14 Barb. (N. Y.) 206.

⁷ *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 222.

⁸ *Palmer v. St. Paul, &c. Ins. Co.*, 44 Wis. 201.

⁹ *McBride v. Republic Fire Ins. Co.*, Sup. Ct. Wis., 2 Ins. L. J. 271.

¹⁰ *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176.

¹¹ *Kimball v. Hamilton Fire Ins. Co.*, 8 Bosw. (N. Y. Superior Ct.) 495; *Spring Garden Mut. Fire Ins. Co. v. Evans*, 9 Md. 1. But see *ante*, § 468.

waiver of notice is not a waiver of a particular account of loss where both are required.¹ The insurers will also be estopped to take at the trial any technical advantage of a mistake into which they have led the insured. Thus where the original policy, which was under seal, was burned with the property insured, and the insured applied for and obtained a copy of the policy, by which it did not appear that the original was under seal, upon which an action of assumpsit was brought, upon objection by the insurers that the original policy was under seal, and that therefore the action should have been covenant, the court refused to allow them to deny that the copy which they themselves had furnished was a true copy.² So receiving a premium or assessment with knowledge estops the insurers from denying that the property covers the policy, or setting up a prior forfeiture;³ and if it be a second premium, they will be estopped to set up the collusion and fraud of their agent with the insured, if known to them before the receipt of the second premium.⁴

§ 506. **No Estoppel where the Facts are not known.**— We have already seen that this estoppel takes place as well upon the acts and omissions of agents as upon those of the principals.⁵ And it need not be said that if there is no knowledge, or if the state of facts be not such that knowledge ought to be inferred of the breach of condition or neglect of duty, there can be no waiver of matter of estoppel, as no one can be presumed to have waived that the existence of which he has not known.⁶ Thus, a failure after knowledge of forfeiture to return premiums received before knowledge is not a

¹ *Desilver v. State Mut. Fire Ins. Co.*, 38 Pa. St. 130.

² *Rockford Ins. Co. v. Nelson*, 65 Ill. 415. Strictly there can be no waiver by parol of the conditions of an instrument under seal. *Scott v. Niagara, &c. Ins. Co.*, 25 U. C. (Q. B.) 424; *Viele v. Germania Ins. Co.*, 26 Iowa, 9.

³ *Block v. Columbian Ins. Co.*, 42 N. Y. 393; *Ryder v. Missouri St. Mut. Ins. Co.*, 12 Iowa, 126. And see *post*, § 553; *Elliot v. Lycoming, &c. Ins. Co.*, 66 Pa. St. 22; *Lyons v. Globe Mut. Fire Ins. Co.*, 27 U. C. (C. P.) 567.

⁴ *Armstrong v. Turquand*, 9 Irish Law, n. s. 32.

⁵ *Ante*, § 498 *et seq.*

⁶ *Finley v. Lycoming County Mut. Ins. Co.*, 30 Pa. St. 311; *Forbes v. Agawam Mut. Fire Ins. Co.*, 9 Cush. (Mass.) 470; *Allen v. Vermont Mut. Fire Ins. Co.*, 12 Vt. 366.

waiver of the forfeiture.¹ And this rule was held to apply in a case where proofs were received after the time limited had expired, in the mistaken supposition that they were furnished so soon as they reasonably could be.² [To establish a waiver of a forfeiture the proof must show a distinct recognition of the validity of the policy after a knowledge of the forfeiture.³]

§ 507. **No Estoppel where Insured has not been prejudiced.**

— An estoppel arises where the insurer, having knowledge of the facts to which he has a right to take exceptions, or which would constitute a defence against any claim under the policy, if he chose to avail himself of them, so bears himself thereafter in relation to the contract as fairly to lead the assured to believe that the insurer still recognizes the policy to be in force, and to constitute for him a valid protection. Under such circumstances the courts refuse to allow the insurer to take an unfair advantage of the acts, declarations, or omissions of the insured to his prejudice.⁴ It is not the intention of the insurer alone, but the effect upon the insured as well, which gives vitality to the estoppel, and therefore if the circumstances are such that the insured could by no possibility be prejudiced, it is doubtful whether the insurer can be fairly brought within the scope of an estoppel. The insured must be misled to his prejudice. The waiver that is spoken of in these cases is another term for estoppel. It does not arise by implication alone, nor except from some conduct by one party which leads, or justly may lead, in reliance upon it, another party to believe a certain course of action or non-action on his part will fulfil all his obligations to the first party, so that to allow the first party to disappoint the expectation or belief founded upon and induced by his conduct would be a fraud. To constitute an estoppel there must be such conduct

¹ *Harris v. Equitable Life Ass. Soc.*, 6 T. & C. (N. Y.) 108.

² *American Express Co. v. Triumph Ins. Co.*, Ohio (Dist. Ct.), 5 Ins. L. J. 466.

³ [*Weed v. L. & L. Fire Ins. Co.*, 116 N. Y. 106.]

⁴ *Viele v. Germania Fire Ins. Co.*, 26 Iowa, 9; *Benson v. Ottawa Agr. Ins. Co.*, 42 U. C. (Q. B.) 282; *McMaster v. Insurance Co. of North America*, 55 N. Y. 222.

on the part of the insurers as would if they were not estopped, operate as a fraud on the party who has taken, or neglected to take, some action to his own prejudice in reliance upon it. Where nothing has been done or neglected by their authority, and where no act has been done or left undone by the insured, in reliance upon the act or non-action of the insured, there can be no estoppel. Thus, where the assured notified the company after the loss that further insurance had been obtained, whereupon the company appointed an appraiser, and did not refund the unearned premium, it was held that the insurers had a right to appraise before electing what to do, and the insured was not prejudiced.¹ While a refusal to pay is a waiver of preliminary proof, and such other formalities as may be required in order to enable the insured to bring his action, it is not a waiver of breach of conditions already made. The doctrine of waiver is not to be so extended as to deprive the insurer of his defence merely because he negligently or incautiously, when a claim is first presented, while denying his liability, omits to disclose the ground of his defence, or states another ground than that upon which he finally relies, unless there is evidence from which the jury may infer that, with full knowledge of the facts, there was an intention to abandon, or not to insist upon, the particular defence not specified, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the insured, to his injury.² [Where the officers of a company knowing of a breach of condition met with the adjusters of other companies, involved and discussed the loss, and a reduction was made by the insured on the supposition that the company in question were going to pay, it was held that there was no waiver.³ When a policy contained the condition that "if the interest of the assured in the property

¹ *Jewett v. Home Ins. Co.*, 29 Iowa, 562; *Security Ins. Co. v. Fay*, 22 Mich. 467; *Garber v. Globe, &c. Ins. Co.*, C. Ct. (Mo.), 5 Big. Life & Acc. Ins. Cas. 221; *ante*, § 465; *Phoenix Ins. Co. v. Stevenson* (Ky.), 8 Ins. L. J. 722.

² *Devens v. Merchants', &c. Ins. Co.* (N. Y.), 10 Ins. L. J. 133; 83 N. Y. 168, 172, referring to and explaining *Brink v. Hanover Ins. Co.*, 80 N. Y. 108. See also *Galveston Ins. Co. v. Heidenheimer* (Tex.), 9 Ins. L. J. 592.

³ [*Putnam Tool Co. v. Fitchburg Mut. Fire Ins. Co.*, 145 Mass. 265.]

be not truly stated it shall be void," and also "if the interest be other than the entire, unconditional, and sole ownership &c., it must be so stated in the policy," otherwise it is void — and where a warehouse-man under these provisions insured the goods of his principal *in his own name*, it was held that there could be no recovery for them¹ although the agent of the insurance company knew at the time the real relations of the parties to the subject-matter. A parol waiver of the conditions in respect to proofs of loss, increase of risk, time of paying premiums, keeping hazardous goods, &c., has been held good, but the conditions as to the subject of insurance and the ownership thereof cannot be waived by parol. We cannot allow the plaintiffs to maintain an action on a policy in which they are not named and which, by its very terms, excludes all property except such as is owned by Ashem in his own name. When a policy provided that in case of loss of the ship insured the master and crew should make a formal protest at once before a notary, such a condition is not waived by the simple direction of an agent of the company to *one of the crew* to go *before an officer* and make a protest.² Mere knowledge by the company of a breach of condition is not a waiver if the assured is not misled.³ The doctrine of estoppel only applies where the party claiming the benefit of it was induced to alter his condition for the worse.⁴

§ 508. **Evidence; Silence and Intent.** — Mere silence, it has been sometimes said, is never a waiver;⁵ but it is conceived

¹ [Fuller v. Phoenix Ins. Co., 61 Iowa, 350 at 352.]

² [Peoria Mar. & Fire Ins. Co. v. Walser, 22 Ind. 73 at 85.]

³ [N. Y. Cent. Ins. Co. v. Watson, 23 Mich. 486.]

⁴ [Smith v. Ferris, 1 Daly, 18 at 20.]

⁵ Ayres v. Hartford Fire Ins. Co., 17 Iowa, 176. [Where it came to the notice of the secretary through conversation, while walking on the street, that a factory covered by one of the company's policies was running gins contrary to conditions, it was error to charge that the secretary's knowledge was that of the company, and that *if the company did not promptly notify the insured that his policy was cancelled, the matter was waived*. Silence alone will not estop the company. Texas Banking Co. v. Hutchins, 53 Tex. 61, 69; Donahue v. Windsor Co. Mut. Fire Ins. Co., 56 Vt. 374. Mere inaction of the company for thirty days or so after hearing that the habits of the assured are not as they were represented,

that the true doctrine on this point is, that while mere silence in some cases, where that silence has no effect upon the insured, may not operate as a waiver, yet in others, where it has the effect to mislead the insured, it will so operate. Thus, where in an application the insured by mistake falsely states that there is no incumbrance, but subsequently and before the issue of the policy gives notice of the mistake, this would be a rectification of the mistake. And if the notice be not given till after the issue of the policy, if the company do not elect to cancel the policy, it is questionable if they would not be estopped to set up the misrepresentation.¹ And so it is also sometimes said that a waiver never occurs unless intended, or where the act relied on as a waiver is such that it ought in equity to estop the party from denying it. Thus an assessment, by mistake of the treasurer of a mutual insurance company, on a premium note, upon a vote to assess "all policies in force" after the policy has been declared forfeited for breach of condition, though the assessment be paid, is no waiver. The assessment, not being by the authority of the company, is not their act and of course they can intend nothing by it. They have no knowledge of the act and to constitute waiver there must be not only knowledge of the thing waived, but the act of waiver must be knowingly done.² But this also, it will be observed, limits the knowledge or intention to the act that constitutes the waiver, and with this limi-

is no waiver. *Adreveno v. Mut. Reserve Fund Life Ass.*, 38 Fed. Rep. 806 (Mo.), 1889.]

¹ *Anson v. Winnesheik Ins. Co.*, 23 Iowa, 84; *Guernsey v. Am. Ins. Co.*, 17 Minn. 104; *Williamsburg Ins. Co. v. Cary*, 83 Ill. 453; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143.

² *Diehl v. Adams County Mut. Ins. Co.*, 58 Pa. St. 443; *Beatty v. Lycoming County Mutual Ins. Co.*, 66 Pa. St. 9. [A waiver is an intentional relinquishment of a known right, or such conduct as warrants an inference of such intent, and where it appears that there was no such intent in fact, and no understanding on the part of the insured that the proofs were waived, so that he was not misled, it will be held that there has been no waiver. *Findeisen v. Metropole Fire Ins. Co.*, 57 Vt. 520. Both the assured and the underwriter must understand that there is a waiver of a condition, in order to make it operative. The understanding of one party without sufficient cause given by the other, is not enough. *Hambleton v. Home Insurance Co.*, 6 Biss. 91 at 95.]

tation is no doubt the law. The waiver may be actually unintentional, though if the act out of which it comes be intentional, the waiver is constructively so.

§ 509. **Agent acting under Undisclosed Instructions.** — The energetic language of the court in a very recent case in Illinois¹ not only leaves no doubt as to the position of that court, but well expresses the spirit of the modern decisions touching the responsibility of insurance companies for the acts of their agents in violation of instructions. "We desire it to be understood," is the language of the court, "in this jurisdiction, at least, when an insurance company has appointed an agent, known and recognized as such, and he, by his acts, known and acquiesced in by them, induces the public to believe that he is vested with authority to do the act, and nothing to the contrary is shown or pretended at the time of doing the act, public policy and the safety of the people demand that the company should be liable for such acts as appear on their face to be usual and proper in and about the business in which the agent is engaged. It is the fault of the companies in sending out agents among the people, gaining public confidence by the seeming acquiescence of their constituents in the conduct of their business. When a loss happens, they should not be permitted to say in any case that their agent acted beyond the scope of his authority, unless it shall be made to appear that the insured was informed of and knew the precise extent of the authority conferred. Any other principle in its operation would be turning loose upon an unsuspecting, honest, and confiding people a horde of plunderers, against which no ordinary vigilance could guard," — language which, if it savors somewhat more of the fervor of the advocate than is accustomed to be heard from the bench, it must be confessed, ought to find its full justification in the indignation which must at times be felt at the pertinacity with which insurers seek to shelter themselves behind instructions, the existence of which is not only not known to others, but in point of fact is practically denied by the daily conduct both of themselves and their agents.

¹ *Ætna Ins. Co. v. Maguire*, 51 Ill. 342.

§ 510. **Estoppel where the Act is prohibited by the Charter.** — We have already seen that by the general current of the authorities insurance companies may waive a compliance with the provisions of their charters and by-laws,¹ though in Massachusetts and in some other States this doctrine is not admitted as applicable in mutual insurance to the essentials of the contract, but only as to such matters as pertain to its enforcement after a loss.² [Where by the very terms of the certificate other certificate holders are to receive the benefits accruing from forfeitures, the company cannot waive a forfeiture without the consent of the other policy-holders.³ The company cannot waive a compliance with the mode of contract prescribed by its charter, as, for example, where the charter requires the policy to express the true title of the insured and the incumbrances.⁴] A case in Connecticut, upon full consideration, adopts and approves the doctrine of the Massachusetts cases, in an opinion, which, as it presents some novel views, we give at length:—

“The twelfth section of the charter of the defendants provides that, ‘If there shall be any other insurance upon the whole or any part of the property insured, by any policy issued by said company, during the whole or any part of the time specified in such policy, then every such policy shall be void, unless such double insurance shall exist by consent of said company, indorsed upon the policy, under the hand of the secretary.’ There was such double insurance in this case, at the time this policy was issued, and the consent of the company thereto was not indorsed upon the policy. The charter, therefore, declares the policy void, and it is void, unless the twelfth section is of such a character that its provisions can be waived by the defendants.

“If this provision was made solely for the benefit of the defendants, there might be force in the claim of the plaintiffs

¹ *Ante*, §§ 62, 143, 501.

² *Ante*, § 147. [Directors cannot waive charter provisions. *Gibbs v. Richmond Co. Mut. Ins. Co.*, 9 Daly, 203.]

³ [*Milligan v. Goddard*, 1 How. Pr. U. S. 377.]

⁴ [*Leonard v. American Ins. Co.*, 97 Ind. 299.]

that it could be waived, on the ground that what is exclusively for the benefit of a person, either natural or artificial, is for him to enjoy or not, as he pleases; and if he chooses to forego the benefit, he has a right to do so, as no one but him is interested in the matter. But we think that the defendants are not solely interested in this provision of the charter. It was made to guard against the danger of over insurance. It is well known that over insurance encourages incendiary fires, and insurers are therefore extremely careful not to insure property to the full amount of its value, but leave the assured to be himself the insurer of a part thereof, that he may have a common interest with them in the preservation of the property.

“The eleventh section of the defendants’ charter, as well as the one under consideration, shows what solicitude the legislature entertained upon this subject, and the great care they exercised to prevent this evil.

“Such being the tendency of over insurance, it is manifest that it endangers not only the welfare of insurers, but the welfare of all their policy-holders, who have a deep interest in their solvency in case of loss by fire. Insurance companies insure property to an amount many times their capital, and it may easily happen that a few fraudulent incendiary fires, scattered over the country, should involve them and their policy-holders in heavy and perhaps ruinous losses. But the evil of over insurance does not stop here. Everywhere insured property is mingled indiscriminately with property not insured. The burning of the insured property burns the other also, and every year vast amounts of property not insured go to destruction in consequence of the over insurance of property in its neighborhood. Surely the welfare of such owners should be considered by legislatures, and provision should be made for them when corporations like these are created. It is to be considered, also, that the welfare of the State, which has an interest in all the property of the State, requires that this should be done.

“One great source of this evil is the insurance of the same property by different companies, when each company is not

aware of the act of the other. To prevent this evil as far as may be, in the present case, we think, the legislature inserted the twelfth section in the defendants' charter, intending thereby to put it out of the power of the defendants to insure property otherwise than is provided therein.

"The evil could not be successfully reached by merely requiring the *consent* of the company to such further insurance. There would be no security from misunderstanding, misremembrance, and fraud. The difference is great between leaving the consent of the company to be proved by the vagueness and uncertainty of parol evidence, and requiring it to be shown by a formal indorsement upon the policy by the hand of their secretary, which could not be made without consideration and deliberation on the one hand, and certainty of the fact on the other.¹ This difference is all-important in a case like this, and indeed, if mere consent was all that the legislature intended by the twelfth section of this charter, then no object was accomplished, or could be accomplished, by inserting it in the charter; for if the defendants should make an absolute contract of insurance, without any condition that it should become void if there was or should be further insurance on the property by any other company, during the whole or any part of the time covered by the policy, they would be taken by jurors as having given consent in advance to such further insurance; or the mere fact of such absolute contract would be sufficient evidence with them of a waiver of the condition. It would be urged that the plaintiff was ignorant of the provisions of the charter, and if the defendants intended to make it a part of the contract, they would have informed the plaintiff by inserting it in the policy.

"Thus, in order to make it a part of the contract, it would have to be inserted in the policy of insurance, whether it was embodied in the charter or not; and if inserted in the policy it would have all the effect that the charter could give it, if the legislature intended no more by this provision than mere consent. We think, therefore, that the legislature had more than this in view, and intended to limit the power of the

¹ *Hale v. Mechanics' Mut. Fire Ins. Co.*, 6 Gray, 169.

company in the matter, and that it was not competent for the plaintiffs to prove the consent of the defendants to the double insurance on the plaintiffs' property by any other evidence than an indorsement of such consent on the policy, under the hand of the secretary of the company, and that the jury should have been so instructed."¹

§ 511. **Waiver ; Stipulation against ; Limitation of Agent's Authority.** — A clause in a policy of insurance that "nothing but a distinct specific agreement, clearly expressed and indorsed on the policy, shall operate as a waiver of any printed or written condition, warranty, or restriction thereon," refers to those conditions and provisions of the policy which enter into and form a part of the contract of insurance, and are essential to make it a binding contract between the parties, and which are properly designated as *conditions*, and not to those stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing preliminary proof of the loss.² [On the other hand it has been held that before a blank policy is filled and signed a general agent may change its conditions, although the policy provides that the agent has no authority to waive or modify any of its conditions. This is only a limitation of the agent's power to waive or modify the contract when once made. There can be no waiver of rights under a contract until the contract is consummated.³ This is clearly *not* the plain common-sense meaning of the clause. The decisions are by no means uniform under this head. It has been held that a provision that there shall be no waiver

¹ Couch v. City Fire Ins. Co., 38 Conn. 181.

² Franklin Fire Ins. Co. v. Chicago Ice Co., 36 Md. 102. [Bowes v. Nat. Ins. Co., 20 N. B. R. 438; New Orleans Ins. Ass. v. Matthews, 65 Miss. 301; O'Key v. State Ins. Co., 29 Mo. App. 105; Carson v. Jersey City Ins. Co., 43 N. J. 300. A provision in the policy that agents have no authority to make, alter, or discharge contracts, does not make it impossible for an agent to bind the company by making representations, lulling the insured into security until the six months' limitation of suit is past. Jennings v. Metropolitan Life Ins. Co., 148 Mass. 61. In this case the agent told the insured's attorney that the company was investigating the loss, and that if there was no fraud the claim would be paid. Relying on this the attorney failed to sue within the limit, and the company was held to be estopped.] *Ante*, §§ 363, 473.

³ [Continental Ins. Co. v. Ruckman, 127 Ill. 364, 373.]

without a distinct agreement indorsed on the policy, no officer can authorize a breach of condition in any other manner.¹ And the policy is avoided by an assignment of the property and the policy without consent of the company, although the agent promises to have the proper indorsements made on the policy, and receives subsequent premiums.² A condition that waiver must be indorsed on the policy is valid, unless the insured has been induced by the company to act to his damage, on the understanding that the provision would not be insisted on.³ Again we find that a provision in a policy that no act of any agent other than the president or secretary shall be held to be a waiver of a full compliance with all provisions of the policy is null and void.⁴ And that an agent may waive conditions in the policy, though it is contrary to its express terms for him to do so.⁵ Notwithstanding such a condition, parol consent of the president of the company to the removal of goods from one place to another is good. It is a waiver of the stipulation itself.⁶ And though notice to the insured that an agent has no power to waive conditions must have its effect, and, *prima facie*, must bind the insured; yet, if it appear that the insurers have customarily permitted the agent to waive, and have ratified his conduct, there seems to be no reason to

¹ [Gladding v. Cal. Farmers' Mut. Fire Ins. Ass., 66 Cal. 6; Enos v. Sun Ins. Co., 67 Cal. 621.]

² [Shuggart v. Lycoming Fire Ins. Co., 55 Cal. 408.]

³ [Universal Ins. Co. v. Weiss, 106 Pa. St. 20.]

⁴ [Day v. Dwelling-House Ins. Co., 81 Me. 244.]

⁵ [Whited v. Germania Fire Ins. Co., 76 N. Y. 415 at 421 (condition against transfer of property); Swartz v. Insurance Co., 15 Phil. 206 (waiver by adjustment and official announcement of it).]

⁶ Maryland Fire Ins. Co. v. Gusdorf, 43 Md. 506. See also Carroll v. Charter Oak Ins. Co., 1 Abb. Ct. of App. Dec. (N. Y.) 316, affirming s. o 38 Barb. (N. Y.) 402; Michigan State Ins. Co. v. Lewis, 30 Mich. 41. See also Guernsey v. American Ins. Co., 17 Minn. 104. [The condition as to writing may be waived as well as any other, and when written notice is required, verbal notice is sufficient, unless prompt objection is made thereto. Piedmont, &c. L. Ins. Co. v. Young, 58 Ala. 476. And although by the terms of the policy its conditions cannot be waived except by indorsement upon it, yet if an agent does waive a condition and the company afterward adopts his act, it cannot set up that provision of the policy against the insured. Carroll v. Girard Fire Ins. Co., 72 Cal. 297.]

doubt that this also will amount to a waiver of the limitation upon the power of the agent.¹ But the insurers will not be estopped from setting up a forfeiture for non-payment of premium, by proof that the agent had agreed that notice should be given when the premium should fall due, when it appears that a policy was afterwards accepted containing a distinct notice that the agent could not waive a forfeiture, or alter that or any other condition of the policy.² And if the policy provides that alteration or waiver of its conditions cannot be done "unless made at the head office, and signed by an officer of the company," a general agent is without authority to act in the matter.³ [If there is no provision in the policy to the contrary the agent may modify or waive any of its conditions.⁴ An agent having power to attach a certain condition to a policy or not as he may deem proper, may waive it afterwards.⁵ A secretary of an insurance company as such has no power to waive any part of the written contract without the knowledge and assent of the corporation or of the board of directors or other officers having power to make contracts of insurance in the name of the company. In this case the secretary attempted to waive the stipulation in an open policy, that the subject insured should "be specified by application and mutually agreed on and *written on the policy*." ⁶]

§ 512. **Estoppel; Notice from Stranger.** — If the object of requiring notice of increased risk, or of a change of circumstances calculated to produce such increase, be stated to be that the insurer may exercise or not an option reserved to him to cancel the policy, which he reserves the right to do at pleasure, and without assigning any reason therefor, and he obtains notice from other sources of such facts, since this

¹ *Globe Mut. Life Ins. Co. v. Wolff*, 95 U. S. 326. But see *Caton v. American Life Ins. Co.*, 33 N. J. 487; *Mersereau v. Phoenix Life Ins. Co.*, 66 N. Y. 74; *ante*, § 339.

² *Union Mut. Ins. Co. v. Mowrey*, 96 U. S. 544.

³ *Marion v. Universal Life Ins. Co.* (N. Y.), 11 Repr. 780.

⁴ [*Silverberg v. Phenix Ins. Co.*, 67 Cal. 36; *Kruger v. Western Fire & Mar. Ins. Co.*, 72 Cal. 91.]

⁵ [*Niagara Fire Ins. Co. v. Brown*, 123 Ill. 356.]

⁶ [*Plahto v. Mer. & M. Ins. Co.*, 38 Mo. 248 at 255.]

accomplishes the purpose for which the condition is made, and to all intents and purposes places the insurers in as good a position as if the facts had been notified to them by the insured himself, this knowledge, so obtained by the insurers from other sources, will inure to the benefit of the insured, and excuse his default, if any, in failing to give notice. Or, at all events, if the insurer, when these facts come to his knowledge, does not thereupon elect to cancel his policy, but allows it to remain, he will not be permitted afterwards to set up such default in defence.¹

§ 513. **Collusion between Agent and Insured.** — Insurers, however, will not be estopped to set up a misrepresentation or concealment or a breach of warranty in defence to an action, if it shall appear that there was a want of good faith on the part of the insured, as where it is known to the insured that the agent is violating his instructions in taking the insurance, and especially, if there be collusion between them, to falsely describe the property in order to bring it into the category of insurable subjects, upon which the agent is permitted to take risks. If, for instance, it is known to both that the company will not insure hotels, and for the purpose of evading this restriction it is agreed between them to describe the insured property as a boarding-house, under such circumstances the insurers would not be estopped to set up the fraud. If they were, then the insured would derive advantage from his own fraud. And this would be counter to the whole purpose and object of an estoppel, which is to discountenance and circumvent fraud. And it is only when its enforcement will operate to this end that it can properly be invoked. Besides, the knowledge of the agent is imputable to the principal, on the presumption that the agent, in the honest discharge of his duty, communicates to his principal all the material facts, touching the negotiation, which come to his knowledge, — a presumption which can hardly have place, when the facts to be communicated would convict him of a dereliction of duty.²

¹ *Eclipse Ins. Co. v. Schœmer*, 2 Cincinnati Superior Court Reporter, 474.

² *Rockford Ins. Co. v. Nelson*, 75 Ill. 548.

CHAPTER XXIX.

OF ACCIDENT INSURANCE.

ANALYSIS.

- § 514. Definition of accident. (See also §§519, 520, and notes. The idea of the first case in § 515 is not sustainable.) Pitchfork slipping out of worker's hand and injuring his bowels is an accident, so sprain by lifting heavy weights.
- § 515. Rupture caused by voluntarily jumping from cars held not an accident.
- § 515 a. Rupture of blood-vessel by striking Indian clubs against a stove, is accident.
- § 516. Death by drowning may or may not be accidental, according to circumstances, § 516; see also §§ 517, 518, 518 A.
"outward and visible means," §§ 516, 517.
- § 517. If a wound causing a fall into water and consequent drowning, there is an accidental death. Drowning.
- § 517 A. "External, Violent, and Accidental" means.
Exertion of holding a runaway horse. Charbon poison.
- § 518. "Cause of death arising within the system."
- § 518 A. Disease, epileptic fit, and drowning, company liable.
- § 518 B. Death by poison.
- § 519. Sunstroke not accident (?). Some violence, casualty, or *vis major* must be involved (?); see § 529.
- § 520. Death by robbers probably accidental.
- § 520 A. "Intentional injuries inflicted by assured or others."
- § 521. A railway accident is one occurring in the course of, and arising out of, the fact of a railway journey.
- §§ 522-523. Total disability for usual occupation.
- § 523 A. Act not incident to the occupation described in the policy. Death from fits plus accident, accident plus a cold; "inhaling gas" held to mean only voluntary inhaling. Condition that death must occur within ninety days after the accident.
- §§524-531 A. Travelling, § 524.
On foot, §§ 524, 528, 529.
Conveyance, §§ 524, 525, 526, 528, 529.
Engineer, §§ 526, 527.
Alighting, §§ 524, 525.
Getting on a moving train, §§ 524 A, 529.
Standing on car platform, § 524 A.
Limit of journey, § 525.
Negligence, §§ 524 A, 525, 530.
Condition to be careful, § 531.
Wilful exposure, § 530.

- Voluntary exposure to unnecessary danger, § 531 A.
- Obvious risk, § 530.
- Violation of law, § 530.
- Intoxication, § 531.
- §§ 532, 533. Increase of risk. Change of occupation. Classification of risk, § 533.
- § 534. Extent of risk.
- § 535. Insurable interest. Amount of loss.
- § 536. Notice of death or injury. Preliminary proof (see also § 539).
- § 537. Form and completion of the contract.
- § 538. Accidents to carriages.

§ 514. Definition of Accident ; Injury causing Death ; Strain.

— What is an accident? This question arises at the very threshold in the consideration of this branch of insurance, and has been, and is likely to continue to be, a fruitful source of discussion.¹ No satisfactory definition seems yet to have been given by the courts, though numerous cases have occurred where they have been called upon to decide whether death or injury from particular causes was, or was not, accidental. In a recent case in the Supreme Court of Pennsylvania,² it appeared that while the insured was pitching hay the handle of the pitchfork slipped through his hands and struck him on the bowels, inflicting an injury which produced peritoneal inflammation, in consequence of which he died, and this was held to be an accidental death. And the same would have been the case, say the court, if a strain had been the cause of the inflammation which produced death. Death by accident was defined to be “death from any unexpected event which happens as by chance, or which does not take place according to the usual course of things.” So a sprain of the muscles of the back, caused by lifting heavy weights in the course of business, is injury by accident or violence “occasioned by external or material causes operating on the person of the insured.”³

¹ [The word “accident” means an event that takes place without one’s foresight or expectation, and includes an injury in an affray without fault on the part of the plaintiff. Supreme Council, &c. *v.* Garrigus, 104 Ind. 133, see § 520.]

² North American Ins. Co. *v.* Burroughs, 69 Pa. St. 43.

³ Martin *v.* Travelers’ Ins. Co., 1 F. & F. 505.

§ 515. **Accident ; Rupture from Jumping.** — On the other hand, it has been said by a learned judge, sitting as arbitrator, that “rupture caused by jumping from the cars while in motion, and afterwards running to accomplish certain business purposes, done voluntarily and in the ordinary way, and without any necessity therefor, and with no unforeseen or involuntary movement of the body, such as stumbling or slipping or falling, is not by violent and accidental means. It might be otherwise if, in jumping, the insured should lose his balance and fall, or strike against some unforeseen object, or in running should stumble or slip.”¹ The learned arbitrator based his award upon the following, amongst other reasons : —

“The policy is one of indemnity against ‘bodily injuries, effected through violent and accidental means, within the meaning of this contract and the conditions hereto annexed.’ Had the terms of the contract stopped at the words ‘violent and accidental means,’ there would be no difficulty, in my judgment, in disposing of the questions; for there was no accident, strictly speaking, in the means through which the bodily injury was effected. It would not help the matter to call the injury itself, that is, the rupture, an accident. That was the result, and not the means, through which it was effected. The jumping off the cars, or the running, was the means by which the injury was caused. Both were done by the claimant voluntarily, in the ordinary way, with no unforeseen, accidental, or involuntary movement of the body whatever. There was no stumbling or slipping or falling. There was nothing accidental in his movements, any more than there was in his passing down the steps of his hotel, or in his walking on the street, during each of which he might have had a stroke of apoplexy, or a hemorrhage, a rupture of a blood-vessel in the head or the lungs. True, in jumping from the cars and running there was more violence, or, properly speaking, more force; but there was no more accident than in any ordinary movements of the human body. How, then, admit-

¹ Southard *v.* The Railway Passengers’ Ass. Co., 34 Conn. 574, per Shipman, Judge of the District Court of the United States, acting as arbitrator.

ting the rupture to have been effected by jumping from the cars, or by running to see if they were coming, can it be said that it was caused by accidental as well as violent means? All the accident there was, was the result of ordinary means, voluntarily employed, in a not unusual way.

“But the words ‘violent and accidental means’ are followed in the policy by the words ‘within the intent and meaning of this contract and the conditions hereunto annexed.’ Now we are to consider how far the former words are qualified by the other parts of the contract, or by the conditions thereto annexed. I have cited from the policy all that can have any bearing on the question. The provision which I have cited from the policy excludes from indemnity death or injury when caused by ‘duelling, concealed weapons, when carried by the insured, fighting, wrestling, over-exertion, and lifting (except in case of perilous necessity), suicide, sun-stroke;’ and also ‘death or injury happening in consequence of war, riot, invasion, riding or driving races, unnecessary exposure to danger or peril, or violation of the rules of any company or corporation.’ It also excludes ‘death or injury happening while the insured is, or in consequence of his having been, under the influence of intoxicating drinks, or engaged in any unlawful act.’ Now it may be said that this specific exclusion from the scope of indemnity of death or injury happening from causes and under circumstances expressly set forth, leaves, by fair implication, death or injury from all other causes, and under all other circumstances, included in the contract of indemnity; thus logically inverting or complementing the maxim, *expressio unius est exclusio alterius*. But in applying this well-known rule of construction, reference must be had to the main body of the contract and to its subject-matter. It is not, nor does it purport to be, a contract of indemnity against death or injury effected by all means. The cause of the death or injury must in all cases be ‘violent and accidental,’ or the event is without the scope of the contract. The instrument by its terms embraces only cases where the elements of force and accident concur in effecting the injury. The cases excluded are only those which belong

to the same class. The contract declares to the insured that though he may be killed or injured through violent and accidental means, yet if the calamity occurs under certain circumstances, the insurers will not be liable. Violent and accidental death or injury might occur, and often does occur, under the circumstances enumerated in the excluding clause.

“The contract, as I have already intimated, in its broadest scope only embraces within its indemnity personal injuries effected through forcible and accidental means; and the proviso simply excludes from this class of injuries all that occur under the circumstances enumerated. All others of this class are included. The degree of violence or force is not material, and had the insured in this case in jumping from the car lost his balance and fell, or struck upon some unseen object and wounded himself, or in running had stumbled or slipped on the ice, his injury might be attributed to accidental as well as violent means, and assuming that there was no want of due diligence on his part, his misfortune would have been covered by the policy. But, as I have already stated, the injury which he received was in no sense the result of accident. He jumped from the car with his eyes open, for his own convenience, and not from any perilous necessity. He encountered no obstacle in doing so. He alighted erect on the ground just as he intended to do. So in running he ran from no peril or necessity, but for his own convenience, voluntarily, and, from all that appears, without stumbling, slipping, or falling. In both cases he accomplished just what he intended to, in the way he intended to, and in the free exercise of his choice. No accident of any kind interfered with his movements, or for an instant relaxed his self-control. All that he claims is, that, some hours after, it was discovered that a muscle in the walls of the abdomen had given way under the strain to which he had voluntarily put it, under circumstances free from all peril or necessity. Assuming that this rupture was caused either by his jumping or running, or both, does not help the matter, unless we call running and jumping accidents. I therefore am of opinion that the alleged injury did not result from an accident, within the meaning of the contract.”

[In what seems a far more sensible case it was held that the jury are at liberty to find death by accident where B. jumps from a platform four or five feet high which produced a disorder, probably stricture of the duodenum, so that he could retain nothing on his stomach, vomited, and passed nothing but decomposed blood and mucus, and died in nine days. Two others jumping at the same time were uninjured. The injury was not such a result as ordinarily and naturally proceeds from the conduct of the insured. Something unusual, unforeseen, unexpected, that is, accidental occurred, to which the death is attributable.¹]

§ 515 a. **Accidental Means; Rupture; Gymnastic Exercise; Overdose of Opium.** — In a case where the injury was received while exercising with Indian clubs, one of them striking against a stove, the instruction to the jury was as follows: “If the deceased voluntarily took into his hands the clubs for exercise, and used them for such exercise in the way and precisely as he intended to do, and without anything occurring to interfere with his intended and usual movements in such exercise, — that is, if he voluntarily used these clubs in the ordinary way for taking such exercise, without the occurrence of any unusual circumstance interrupting or interfering with such use, or causing any unforeseen, accidental, or involuntary movement of the body, and in such use of clubs there occurred the rupture of a blood-vessel, and consequent injury, as claimed, — I do not think it could be said, in such case, that the means through which the injury occurred was accidental. But if while engaged in such exercise there occurred any unforeseen accident or involuntary movement of the body of the deceased, which brought about, in connection with the use of the clubs, the injury, or if there occurred any unforeseen or unexpected circumstance which interfered with or obstructed the usual course of such exercise, and there was thereby produced an involuntary movement, strain, or wrenching of the body, by means of which the alleged injury was occasioned, that would be an accident within the policy; that is, the

¹ [U. S. Mut. Acc. Ass. v. Barry, 131 U. S. 100.]

means by which the injury was effected would in such case be accidental.”¹

Death by inadvertently taking an overdose of opium prescribed by a physician is caused by “medical treatment for disease,” and is not a case of bodily injury effected through “external, violent, and accidental means,” occasioning death.²

§ 516. **Accident; Drowning; Secondary Cause; External Sign; Outward and Visible Means.**—In *Trew v. Railway Passengers' Assurance Company*,³ the question arose whether a man who was drowned while bathing, nothing being known of the particular circumstances under which the drowning happened, came to his death by “accident or violence,” and the conclusion of the court seemed to be that whether such death was accidental or not would depend upon the circumstances. These the plaintiff could not show, and as the burden of proof was upon him he must fail, as there was nothing by which the jury or the court could determine one way or the other. All the evidence there was, was as consistent with the theory that he died of natural causes as from accident. “If a person,” said Martin, B., by way of illustration, “mistook the depth of the water, and in plunging into it struck his head against a rock and was killed, that would be a death from injury caused by accident; but death from apoplexy would not.” “This case,” said Watson, B., “ranges within that class where, if the state of facts is consistent with one view or the other, there is no evidence for the jury. Here there is no evidence how the assured died (except that there was some evidence that he was drowned while bathing); he may have died from apoplexy, or he may have been struck by a boat. If a man was found dead in a railway carriage, we could not assume that he died from an accident; but if he was found with marks of violence upon his person, the case would be different. There is nothing to lead to the supposition that the assured died in the one way rather than the other.” But this decision was reversed in the Exchequer Chamber,⁴ Cockburn, C. J., delivering the

¹ *Dyer J., McCarthy v. Travelers' Ins. Co., C. Ct. (Wis.), 8 Ins. L. J. 208.*

² *Bayliss v. Travelers' Ins. Co., C. Ct. (N. Y.), 6 Ins. L. J. 109.*

³ 5 H. & N. (Exch.) 211.

⁴ 6 H. & N. 839.

opinion of the court. "We are all of the opinion," said the learned Chief Justice, "that this nonsuit was wrong, and that the judgment of the Court of Exchequer in refusing to set it aside was erroneous. It is said that, assuming the deceased died by drowning, drowning is not one of the cases comprehended in this policy of assurance. Mr. Lush ingeniously argued that the policy only applies to cases where, from accident or violence, some injury occurs, from which death may, or may not, ensue; and if it ensues within three months, the sum assured is payable. But he contended, in effect, that where the cause of death produces immediate death without the intervention of any external injury, the policy does not apply; and whereas from the action of the water there is no external injury, death by the action of the water is not within the meaning of this policy. That argument, if carried to its extreme length, would apply to every case where death was immediate. If a man fell from the top of a house, or overboard from a ship, and was killed, or if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the policy, and the effect would be that policies of this kind, in many cases where death resulted from accident, would afford no protection whatever to the assured. We ought not to give to those policies a construction which will defeat the protection of the assured in a large class of cases. We are, therefore, of opinion that, if there was evidence for the jury that the deceased died by drowning, that was a death by accident within the terms of this policy. The next question is, whether there was evidence for the jury that the assured met with his death by drowning. It appears that he went to Brighton for recreation, and there is no reason to suppose that he intended to commit suicide. He left his lodgings for the purpose of bathing, and his clothes were found by the water-side, but he himself was not afterwards seen. A body was found in the water at a distance from the place where he went to bathe, but not at such a distance that it might not have been carried there by the waves. There was some evidence that this was the body of the assured, and assuming that it was, the question ought to have been submitted to the jury

whether he met with his death by drowning. If they found that he died in the water, they might reasonably presume that he died from drowning. It is true that death occurs in the water in some instances from natural causes, as apoplexy, or cramp in the heart; but such cases are rare, and bear a small proportion to the number of deaths which take place from the action of the water. We think it ought to be submitted to the jury to say whether the deceased died from the action of the water, or natural causes. If they are of opinion that he died from the action of the water, causing asphyxia, that is a death from external violence within the meaning of this policy, whether he swam to a distance and had not strength enough to regain the shore, or on going into the water got out of his depth."

Apparently to meet such a case as the one last cited a provision has been inserted saving the insurers from liability unless the injury be marked by some "external and visible sign," and the accident is the sole cause of the death.¹ And under this it was held that a complaint of soreness and stiffness was not an external or visible sign, while a discharge of blood from the nostrils, if caused by the injury, would be. It was also recently held, in England, that where a man falls into the water while in an epileptic fit and is drowned, the death is accidental, and by an injury caused by some "outward and visible sign."²

A condition that the insurance shall not cover a "case of death or disability, the nature, cause, or manner of which is unknown or incapable of direct and positive proof," does not apply to a case where the death is obviously by violence, as where a man is found dead in a river or on a railroad track, bruised and torn, yet nothing is known of the precise manner in which it happened.³

§ 517. **Accident; Drowning.** — In *Mallory v. Travelers' Insurance Company*, it was shown that the insured disappeared

¹ *Whitehouse v. Travelers' Ins. Co.*, U. S. C. Ct. (N. H.), 7 Ins. L. J. 23.

² *Winspear v. Accident Ins. Co.*, 43 L. T. Rep. n. s. (Ct. of App.) 459; s. c. 11 Repr. 519; *post*, § 518, at the end.

³ *Wright v. Sun Mut. Life Ins. Co.*, 29 U. C. (C. P.) 221.

on Sunday evening, when he was seen walking on a railroad track, and his body, with a cut on the back of the head, was found in a creek which passed under the railroad through a culvert. A motion was made for a nonsuit, on the ground that there was no evidence to go to the jury of death by accident. But this motion the court refused to allow, and left it to the jury to find whether the death was by accident or not, charging them that the injury on the head need not be the cause of the death, but that if it lead to other results, accidental, from which death ensued, the company would be liable. On appeal it was held that the circumstances attending the finding of the body were sufficient to require the submission to the jury of the question whether the death of the insured was the result of accident or of disease, or some other cause not insured against. The actual cause of death was not certainly proved by the evidence in the case; but when considered in connection with the presumption that sane persons do not ordinarily commit acts the probable consequence of which will be self-destruction, it was sufficient to justify the inference that the deceased fell off, or was hurled off by a violent blow, from the culvert into the stream below, and was drowned. The policy provided for the payment of a gross sum in case of death from accident, and also for the payment of a fixed rate per week in case of injury not fatal but disabling. It also provided that no claim should be made under the policy, in respect of any injury, unless the same shall be caused by some "outward and visible means." And it was held that this last provision applied only to non-fatal injuries.¹

[§ 517 A. **External, Violent, and Accidental.** — A death in a plunge bath was held not to be from "external, violent, and accidental means."² But death by drowning, the boat being overturned by fierce waves seven or eight feet high, is death by external, violent, and accidental means.³ A frightened horse ran away, and though the carriage was not upset, the insured

¹ *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52.

² [*Tennant v. Travelers' Ins. Co.*, 31 Fed. Rep. 322 (Cal.), 1887.]

³ [*Tucker v. Mut. Ben. Life Co.*, 50 Hun, 50. See *Searles v. Manhattan Elevated R. Co.*, 101 N. Y. 661]

was so wrought upon by fright or exertion in restraining the horse that he died within an hour. This was held a death through external, violent, and accidental means, and it was decided that the clause providing that insurance shall not extend to cases in which there were no external and visible signs upon the body did not relate to *fatal* injuries, but only to those not resulting in death.¹

Death caused by charbon poison, that is, the absorption of a putrid animal substance through some portion of the skin, causing malignant pustule, is death by *external, accidental, and violent* means. The putrid substance reached the body, not through the stomach or lungs, but through the skin, the external covering. The means were accidental. It is too improbable to suppose that the deceased intentionally put his hand, infected with putrid meat, upon his lip in order to produce death. If he had intended suicide this would not have been the mode selected. The probability is that he knew nothing of the danger whatever. Lastly, the means were violent. The degree of violence is of no moment. The bite of a fly or sting of a bee or a rattlesnake, sunstroke, freezing, drowning, are all violent in the sense of an insurance policy. In this case whether a fly that had been feeding on the putrid substance lit upon an abraded spot on the lip of the deceased, or he put his hand to his lip with the poison upon it, the contact however delicate was violent, within the meaning of the policy.² That is to say, in plain English, the word violent, so far as it refers to the movement of masses, is of no effect in the policy. If the injury is external and accidental, the plaintiff may recover. Violent is ambiguous. It is impossible to tell what degree of force is intended, therefore, since it is to be taken against the company, all degrees of force are included. The sense of the word "violent" may be looked at in another way. *Force is not merely in the movement of masses. There is such a thing as molecular and atomic violence.* Heat, electricity, and

¹ [McGlinchey v. Fidelity & Casualty Co., 80 Me. 251 (another illustration of the tendency of the courts to go back of the worded contract, to what they deem the fair purpose of it, even at the risk of making a new agreement).]

² [Bacon v. U. S. Mut. Acc. Ass., 44 Hun, 599.]

sound may cause damage that would surely be violent. If a tremendous sound should disrupt the drum of the ear, or mighty heat scorch the flesh, no one would claim that the damage was not by violence. So the atomic force of a poison that from simple contact is able to pierce to the farthest parts of the body, displays a violence greater than that of an arrow that can only overcome the stop of six or eight inches of tissue. But however kindly we look at the decision, and however we strive to entangle the contract in a net of scientific thought that refuses to disclose any breaks in nature corresponding to the words we use, yet the fact remains that the word "violent" has a well-understood meaning, that it is in the contract, has a right to be there, and effect should be given to it. The line between violent and non-violent accidents is hard to draw if we get a microscope and try and draw a hair line that will be scientifically justifiable considering every attribute connoted by the words, but if we stand off and look at the matter in the clear light of every-day common sense, a death by drowning or by suffocation or by the encroachments of poison is not violent. If a runaway knocks a man off a bridge into the water, or a strong wave upsets his boat and he drowns, there is violence in the compound proximate cause. But if he is asleep and the water rises about him or the gas floods his room, there is no violence. If such a death is violent, if a man passing a pest house and getting a taint or a breath that brings him down with small-pox or scarlet-fever, dies by violence, then there is no death that is not violent and the word is nullified in the contract. If the courts think such a term in the policy is unreasonable, let them say so and give their reasons; but, for the sake of sane law, do not make decisions that wipe sections of the English language out of existence.

A clause in an accident policy requiring *direct* and *positive* proof that the injury was caused by external and violent means, cannot alter the rules of evidence in the courts.¹ In some cases the very nature of the injury and the presumption that it was not voluntary may be sufficient to satisfy the requirement, as where the arm of the deceased was broken,

¹ [Utter v. Insurance Co., 65 Mich. 546.]

causing disease of which he died, and the manner and circumstances of the breaking did not appear.^{1]}

§ 518. **Accident; "Cause of Death arising within the System;" "Secondary Cause;" External and Material Cause.** — In the case of *Fitton v. The Accidental Death Insurance Company*,² the deceased met with a violent fall, by which he immediately became ruptured in the bowels, and afflicted with strangulated hernia in the abdomen, for which a surgical operation was necessarily performed, in consequence of which, and the hernia, he died. The question was whether this was a death within the exception of a policy which provided that the company did not insure against death or disability arising from rheumatism, gout, hernia, erysipelas, or any other disease or cause arising within the system of the insured, before, or at the time, or following such accidental injury, whether causing such death or disability directly or jointly with such accidental injury. And it was held that such a death did not arise from a cause within the system, and so was not within the exception. In *Smith v. The Accident Insurance Company*,³ where the facts were that death followed from erysipelas, caused by and expressly found to be the result of an accidental incised wound, and supervening four days after the wound was received, and the provisions of the policy were identical with those in the case last cited, except that the word "cause" was qualified by the word "secondary," three of the judges held this to be within the exception, and distinguished it from *Fitton v. The Accidental Death Insurance Company*,⁴ on the ground that there the accident caused the hernia at the very moment the accident happened, and was part and parcel of it, while here the erysipelas supervened only after a lapse of four days, and so was a "secondary" cause within the meaning of the policy.⁵ In other words, hernia

¹ [Peck v. Equit. Acc. Ass., 52 Hun, 255.]

² 17 C. B. N. s. 122; s. c. 34 L. J. 28 (C. P.).

³ 22 L. T. 861.

⁴ *Ubi supra*.

⁵ In *Harris v. Travelers' Ins. Co.*, Superior Ct. Chicago, 1868, cited in *American Law Review*, July, 1873, p. 589, it was held that death by suicide, three months after an accident, by an insane person, whose insanity was caused by an

supervening immediately to the accidental violence would not be within the exception of the policy, while erysipelas supervening to the same accidental violence four days afterwards would,—a distinction which seems to rest not on the question whether the disease was caused by the violence, but on the lapse of time intervening between the violence and the appearance of the disease caused thereby, and would therefore seem to be unsatisfactory, if for no other reason, because it is impracticable.¹ The contract might make a limitation as to time, but as it does not, it is difficult to see how the courts can say violence producing fatal disease at one time is within the exception, while producing it at another time it is not. What is the limited time which takes the case out of or brings it within the exception?²

accident, was not covered by the policy, as the accident was not the proximate cause.

¹ Whether a cause is proximate or remote does not depend alone upon the nearness in point of time in which certain events occur. The question is not controlled by time or distance, nor by the succession of events. An efficient adequate cause being found must be deemed the true cause, unless some other cause not incidental to it, but independent of it, is shown to have intervened between it and the result. *Kellogg v. Railway Co.*, 26 Wis. 223; *McCarthy v. Travelers' Ins. Co.*, 8 Ins. L. J. 208; *ante*, §§ 302, 459. See also *Insurance Co. v. Tweed*, 7 Wall. (U. S.) 44; *Travelers' Ins. Co. v. Seaver*, 19 id. 531, 539.

² Kelly, C. B., dissented, and thought that the defendants were liable on the policy; the effect of the condition being to exempt the company from liability only in respect of a death from erysipelas, where the erysipelas "arose within the system," and was, as it were, collateral to, and not caused by, the accident to the insured; and that where an insurance company think fit to introduce an exception to the liability for which they have contracted under the policy of insurance, they are bound to express that exception in clear and unambiguous language, so as to leave no reasonable doubt upon the subject; and if there is any ambiguity, that is enough to take the case out of the exception, and the construction should be against the company. As death under similar circumstances is very likely to happen, presenting a like case for the decision of other courts, the views of the learned Chief Baron, so clearly and ably presented, are here given in full:—

"This is unquestionably a doubtful and difficult case, and after listening to the opinions of my learned brethren, I cannot but in some measure mistrust my own judgment; but I am of opinion that the plaintiff is entitled to recover. The facts, as found by the arbitrator, are clear. The deceased, who was insured by the defendants against accidents generally, whilst washing his feet in an earthenware bath sustained an injury, by cutting one of them near the ankle on the ragged edge of the bath. For that wound a surgeon attended him, and

In a still later case, in England, where the insured went in to bathe, and while in a shallow pool was seized with a fit

he was taken to a hospital. Five days after the accident erysipelas supervened, and in two days more he died of that disease. It is expressly found that the erysipelas, which was the immediate cause of death, resulted from the wound, and that unless he had been wounded he would not have had erysipelas.

"The question is whether this death, thus occasioned, is within the meaning of the defendants' policy. Now, I entirely agree with the observations of Willes, J., in *Fitton's case*, that it is extremely important, with reference to insurances, that there should be a tendency rather to hold for the assured than for the company, where any ambiguity arises on the face of the policy; and I will add that it appears to me to be equally important that where an insurance company think fit to introduce an exception to a liability which they have contracted to bear, they should express that exception in clear, unambiguous terms. But when I read this condition, I cannot, especially having regard to the principles of construction laid down, and the decision arrived at in *Fitton's case*, see that the exception as to erysipelas is so worded as to protect the defendants here. The Court of Common Pleas, in the case referred to, put a judicial construction on this very clause, save that the words 'secondary cause' have been introduced since their decision. There, Williams, J., in his judgment, says: 'Looking at the language of the policy, and taking the first condition altogether, upon the best interpretation I can put upon it, I am of opinion that it means to exempt the company from liability only where the hernia arises within the system;' and I am of opinion, in conformity with the opinion there delivered by Williams, J., that it is the effect of the condition to exempt the company from liability only in respect of death from erysipelas, where the erysipelas arises within the system and is collateral to the accident.

"But let us proceed to look a little more closely at the words of the condition. After stating the accidents or causes of death that are insured against, it goes on to specify those causes which are not, including 'rheumatism, gout, hernia, erysipelas,' and then come the words which have been so fully discussed 'or other disease or secondary cause or causes arising within the system of the assured before, or at the time, or following such accidental injury.' Now, according to the view taken by the rest of the court, erysipelas is for all purposes expressly excepted from the series of events which create a liability in the defendants. But if this be the true view, why not have stopped at the word 'erysipelas,' and have added 'however caused, whether by an accident or otherwise?' Moreover, it should be remarked that this unqualified and unlimited construction is inconsistent with the decision in *Fitton's case*, where the death of the insured was from hernia caused by the accident. It is clear to me, therefore, that we must construe these words with reference to those which follow, and place some limitation upon them.

"To revert once more to the language actually used, let us contrast for a moment what the defendants have said with what they might have said. Instead of excepting rheumatism, hernia, &c., whether causing death 'directly or jointly' with the injury, they might have excepted them in unambiguous terms, 'whether produced by the accident or otherwise;' and in the same manner they

whereby he became insensible, and fell with his face downwards, so that his face was partially submerged, and he was

might have gone through a whole catalogue of consequences likely to supervene on a cut or a bruise, — such, for instance, as mortification or hemorrhage, — and, by excepting them expressly, have really rendered the policy almost nugatory. Indeed, they might effect this purpose under the present words, if my learned brethren are right, by merely increasing the diseases specified by name. But could it be contended that by an express mention, say of hemorrhage or mortification, the defendants could exonerate themselves where death had ensued from mortification or hemorrhage supervening on a cut? The death would still be from the cut, and the policy, in my judgment, would be available; for the general effect and true construction of such a document seems to me to be, that it covers not only the actual injury itself, but any disease, like lockjaw, mortification, or erysipelas, which is caused by and may be regarded as the natural and probable consequence of the injury.

“It remains to be considered whether the words of the condition, which have been introduced since the decision in *Fitton’s* case, make any difference in the extent of the defendants’ liability. Without these words, I think that decision is a clear authority for the plaintiff here. But it is by them provided that the policy does not insure against death from the enumerated disorders, or ‘any other disease or secondary cause arising within the system of the insured.’ Now I pause upon the word ‘secondary,’ because it certainly does introduce doubt as to the true construction of the sentence. If it means that whenever the hernia or erysipelas, causing death, is the secondary consequence of the accident, the defendants are not to be liable, then the present case would be within the exception. But I do not think it can be taken in this unqualified sense. It appears to me to be no more than a general word, descriptive of the character of the previously enumerated maladies, and that it must be read with reference to the words immediately following.

“The whole sentence thus read bears to my mind a plain and intelligible, and but for the opinion of my learned brethren I should have said an obvious, meaning. It enumerates a certain class of maladies which are of a secondary character, and which may all of them arise within the system, and continue collaterally to and parallel with the injury sustained; and it provides that where death is caused by any of these secondary diseases arising within the system, then the policy shall not attach, even though the disease, unless aggravated by or conjointly with the injury, would not have been fatal. I do not see how it is possible to reject these words, ‘arising within the system,’ from our consideration; and I find no words in the condition capable of being construed to except the secondary disease of erysipelas altogether, in such a case as this, where it did not ‘arise’ at all within the system, — where (as the arbitrator finds) it never would have arisen but for the accident, and where it was the direct consequence of that accident. My conclusion as to this construction of the condition is strengthened by the remaining words of the condition. The company are not to be liable for a secondary cause arising within the system ‘before, or at the time of, or following such accidental injury, whether causing such death directly or jointly with such accidental injury.’ The very use of this word ‘before’ is an additional reason for construing the whole condition as I do. It

suffocated by the access of water to his lungs, this was held to be a death by accident, and occasioned by an "external and material cause operating upon the person of the insured." Death here was the result of the action of the water on the lungs, and the consequent interference with respiration, and the fact of falling into the water from sudden insensibility was an accident.¹

[§ 518 A. **Disease** as distinguished from external and accidental injury means a disorder originating internally. An external accident may often produce death through the disorganization of internal organs, as in cases of snake-bites, bullet-wounds, malignant pustule, &c.; still the accident is the cause. But if impurities taken into the stomach or lungs produce fever or other disease and death results, the disease is the proximate cause.² Where the policy excepts death arising from natural disease although accelerated by accident, and it appears that the insured died of kidney disease (with which he had been long afflicted) accelerated by a fall, there can be no recovery.³

shows that the real intention was to provide against secondary diseases arising within the system, and which might and probably would, therefore, be before the accident, in point of time, and wholly independent of and collateral to it, and not against those which, like the erysipelas here, were the direct consequence of the accident, and but for that would never have existed at all. And the last material words of the condition, 'whether causing such death directly or jointly with such injury,' also seem to me applicable to a class of diseases causing death either directly or jointly with the injury, but being in their nature wholly collateral to it. Taking, then, the condition as a whole, I am of opinion that it points to a particular class of diseases which arises within the system either before, at, or after the injury, and exempts the defendants from liability when death is caused by any of them, either directly or jointly with the injury, but that it does not apply to any of these diseases when they supervene on the injury, are caused solely by it, and are its natural consequence. In my judgment, this construction is the one which is the more reasonable and natural of the two contended for; but even if I were in doubt, I should still think that the ambiguity of the language used is such as to warrant me in acting on the well-known principle of construction applicable to policies of insurance, and in giving the benefit of that ambiguity to the assured. As, however, my learned brethren are of a contrary opinion, the judgment of the court must be for the defendants."

¹ Reynolds v. The Accidental Ins. Co., 22 L. T. N. S. 820. See also *ante*, § 517.

² [Bacon v. U. S. Mut. Acc. Ass., 44 Hun, 599, 605.]

³ [Anderson v. Scottish Acc. Ins. Co. (Lim.), 27 Scot. L. R. 20, Oct., 1889.]

A policy insuring against injury by "accidental, external, and visible means," but not an injury resulting from "natural disease, or weakness or exhaustion consequent upon disease," covers death by drowning, the insured having fallen in an epileptic fit into a stream he was fording.¹

[§ 518 B. **Death by Poison.** — A policy excepting "death by poison in any manner or form" does not thereby except death from malignant pustule, caused by the infliction of animal poison upon the surface of the body. "Death by poison" is well understood to refer to a substance taken internally, and does not include a rattlesnake bite, or blood-poisoning resulting from a bullet-wound, or charbon poison resulting from the contact of putrid animal substance with an abraded portion of the body, or the thin parts of the lips which absorb the poison.² Whether a bite from a venomous insect is within a policy that excepts injury "by poison in any form or manner" is for the jury.³]

§ 519. **Accident ; Sunstroke.** — In a case involving the question whether death by sunstroke was a death by "accident" within the meaning of the policy, it was said that in the term "accident" some violence, casualty, or *vis major* is necessarily involved, and that disease produced by a known natural cause, as in the case of sunstroke, cannot be considered as accidental, any more than disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences ; unless, perhaps, in cases where the exposure is actually brought about by circumstances which may give it the character of accident. Thus, by way of illustration, if, from the effects of ordinary exposure to the elements, such as is common in the course of navigation, a mariner should catch cold and die, such death would not be accidental ; although if, being obliged by shipwreck or other disaster to quit the ship and take to the sea in an open boat, he remained exposed to wet and cold for some time and death ensued therefrom, the death might properly be held to be

¹ [Winspear v. Accident Ins. Co., 6 Q. B. D. 42.]

² [Bacon v. U. S. Mut. Acc. Ass., 44 Hun, 599, 602.]

³ [Preferred Mut. Acc. Ass. v. Beidelman, 1 Monaghan (Pa.), 481.]

the result of accident. It is true that in one sense disease or death through the direct effect of a known natural cause, such as we have referred to, may be said to be accidental, inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Exposed to the same malaria or infection, one man escapes, another succumbs. Yet diseases thus arising have always been considered not as accidental, but as proceeding from natural causes.¹

“In the present instance, the disease called sunstroke, although the name would at first seem to imply something of external violence, is an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun’s rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less liable, just as persons exposed to the other natural causes above referred to are liable to disastrous consequences therefrom.”²

§ 520. **Accident; Death by Robbers.** — In *Ripley, Administrator v. The Railway Passengers’ Insurance Company*, where it appeared that a man was waylaid and killed by robbers, the question arose, and was discussed, but without result, whether this was death by violent and accidental means, the court inclining, however, to the opinion that it was; and to define an accident as “any event which takes place without the foresight or expectation of the person acted upon or affected by the event,”³ in accordance with the common acceptance of its meaning amongst those who seek insurance, rather than with the more restricted limits of lexicographical definition.⁴

¹ [There is a total misconception here of the nature of accident. The proceeding from natural causes has nothing to do with the matter. All events accidental or not so proceed. It is upon the element of *foresight* that the distinction really rests. *Accidental* is opposed to *foreseen* or *foreseeable* by one of ordinary prudence and understanding under the circumstances, §§ 514, 520.]

² *Sinclair v. The Maritime Passengers’ Ass. Co.*, 7 Jur. n. s. 367, 369.

³ [Actual foresight does not seem necessary to take the case out of the realm of accident. It is enough if the person ought to have foreseen. A result naturally and ordinarily following from the conduct of the assured is not accidental, although *he* might not have foreseen the consequence. See *U. S. Mut. Acc. Ass. v. Barry*, 131 U. S. 100.]

⁴ District Court of the United States for the Western District of Michigan, 1870, 2 Big. Life & Acc. Ins. Cas. 738; s. c. 16 Wall. (U. S.) 336.

[§ 520 A. **Intentional Injuries inflicted by the Insured or Others.** — A construction of the clause exempting the company from liability in case of “intentional injuries inflicted by the insured or by another” which limits its application to injuries *intended by the insured* and holds the company for an injury inflicted by a robber, cannot be sustained.¹ One who is assassinated comes to his death by *accidental* means. The intent of the wrong-doer does not prevent the event from being unforeseen by the insured.² But a policy excepting intentional injuries inflicted by the assured or any other person, does not cover an assassination.³]

§ 521. **Railway Accident.** — A railway accident is one occurring in the course of travelling, and arising out of the fact of the journey. It does not necessarily depend on any accident to the railway or machinery connected with it.⁴ It is an accident which is attributable to the fact that the injured party is a passenger on the railway, and arises out of an act immediately connected with his being such passenger.⁵ It is difficult to lay down any more specific rule, because of the multiplicity of circumstances under which these accidents may occur. Much is to depend upon the circumstances of each particular case. The case last above cited was one where a passenger, in alighting at his journey's end, slipped from the carriage-step, without negligence on his part, and was injured. This was held to be an accident covered by the policy. After taking time to consider, the court, by Pollock, C. B., say: —

“The plaintiff, who was about to take a journey by means of two distinct railways, had insured himself with the defendants against death or personal injury arising from railway accident whilst travelling, the contract fixing the damage in the former event at one thousand pounds. In

¹ [De Graw v. Nat. Accident Soc., 51 Hun, 142; Fischer v. Travelers' Ins. Co., 77 Cal. 246.]

² [Hutchcraft's Ex'r v. Travelers' Ins. Co., 87 Ky. 300.]

³ [Id.]

⁴ Per Alderson, B., Theobald v. The Railway Passengers' Ass. Co., 26 Eng. L. & Eq 432; s. c. 10 Exch. 44.

⁵ Per Pollock, C. B., id.

getting out from one of the carriages on a rainy morning, his foot slipped, whereby he was severely injured. It was conceded by the defendant's counsel that there was no negligence on the part of the plaintiff in reference to the accident. And the first question is, whether this is a railway accident within the meaning of the policy. We are of opinion that it is. However much the company may desire that we should lay down a general rule as to what is a railway accident, I do not know that we are called on, or should be doing our duty, were we to lay down any rule beyond what is necessary to decide the actual case before us. Considering the great number of particulars that may enter into the decision of questions of this nature, and the very complicated character they may assume under circumstances that at present we may not anticipate, I think (and I believe the rest of the court concur with me in thinking) that in the single instance brought before us, under certain circumstances, some of which are not of a general nature, it would be assuming too much to lay down a rule to govern all cases. On the present occasion, it is quite plain that the plaintiff was a traveller on the railway ; it is quite plain that though, at the time of the accident his journey had in one sense terminated, by the carriage having stopped, he had not ceased to be connected with the carriage, for he was still on it. The accident also happened without negligence on his part, and while doing an act which as a passenger, he must necessarily have done ; for a passenger must get into the carriage, and get out of it when the journey is at an end, and cannot be considered as disconnected with the carriage and railway, and with the machinery of motion, until the time he has, as it were safely landed from the carriage and got upon the platform. The accident is attributable to his being a passenger on the railway, and it arises out of an act immediately connected with his being such a passenger. Under these circumstances, we think this was a railway accident within the meaning of the policy ; and, consequently, the action is in our judgment maintainable, and so much of this rule as prays for a nonsuit must be discharged."

And, by way of illustration at the argument, said Pollock, C. B.: "Suppose a person suddenly rose from his seat and struck his head with great violence against the top of the carriage, so as to cause a contusion of the brain; would that be a railway accident?" "Or suppose," said Parke, B., "a person on getting out, not observing that the window was closed, pushed his head through the glass?" "As to railway accidents," said Alderson, B., "my notion of a railway accident is an accident occurring in the course of travelling by a railway, and arising out of the fact of the journey. It does not necessarily depend on any action to the railway or machinery connected with it."

§ 522. **Accident; Total Disability.** — Total disability from the prosecution of one's usual employment means inability to follow his usual occupation, business, or pursuits in the usual way. Though he may do certain parts of his accustomed work, and engage in some of his usual employments, he may yet recover, so long as he cannot to some extent do all parts, and engage in all such employments. Thus, a farmer who cannot attend to his other ordinary duties, though he may milk his cows, and a merchant who cannot get about to look after his business as he ordinarily does, though he may be able to keep his books, are totally disabled within the meaning of such a provision.¹ And in another case,² a substantially similar conclusion was reached as to the meaning of the words "wholly disabled." In that case, said Pollock, C. B.: —

"The action is upon a policy of insurance against injury by accident or violence, effected with the defendants, the Accidental Death Insurance Company, and the question turns upon the meaning of the conditions in this policy, 'that in case such accident or violence shall not cause the death of the insured immediately, but shall cause any bodily injury to the insured of so serious a nature as wholly to dis-

¹ *Sawyer v. The United States Casualty Co.* (Superior Court of Mass., per Reed, J.), 8 Law Reg. N. S. 233; S. C. 1 Big. Life & Acc. Ins. Cas. 289.

² *Hooper v. Accidental Death Ins. Co.*, 5 H. & N. (Exch.) 545; S. C. affirmed in Exch. Ch., 6 H. & N. 839.

able him from following his usual business, occupation, or pursuits, a compensation shall be paid.' The plaintiff met with a serious sprain of the ankle, in consequence of which he was unable to leave his room for some weeks, and was confined to the house for some time longer. During that time it was clear that he was 'disabled from following his usual business, occupation, or pursuits.' Was he 'wholly' disabled? In the course of the argument, Mr. Chambers admitted that if the plaintiff had been a dancing-master he would have been within the meaning of this policy. There is no sound distinction between the case of a dancing-master and that of the plaintiff, who is an attorney. For though a dancing-master with a sprained ankle cannot dance, he may play upon an instrument and instruct other people how to use their limbs in dancing. In the case of an attorney, even if he were prostrate on his bed, deprived of sense and motion, if he had lost all consciousness and power of interference, in one sense, and to some extent he might carry on his usual business and occupation, for even if he were without a partner, the business would not necessarily be stopped, but might be carried on by his clerks. It cannot have been contemplated that in such a case no compensation should be paid. We must, therefore, endeavor to find out what is the true meaning of the language used in the policy. It may well be that the sense intended to be conveyed was, that if the person insured should be wholly disabled from carrying on his business as he usually carried it on, the company would be liable. That is the case here; the plaintiff might and could have done something which he was in the habit of doing before, but he was wholly incapable of doing that which he usually did before. If a man is so incapacitated from following his usual business, occupation, or pursuits as to be unable to do so, he is 'wholly disabled' from following them. His 'usual business and occupation' embrace the whole scope and compass of his mode of getting his livelihood. If it be objected that this construction would lead to the result that a person slightly incapacitated would get the same compensation as one entirely incapacitated from doing

anything whatever, that is the fault of the defendants in using language of a vague and perplexing character. It appears to us they intended that, when the insured was wholly incapable of performing a very considerable part of his usual business, he should receive a compensation in respect of that disablement. If it were necessary to resort to such a rule of construction (which I think it is not) in construing this policy, that construction must be adopted which is most advantageous to the insured. I think, however, that putting a reasonable construction on the language used, the parties must have meant that if the insured was so disabled as to be incapable of following his usual business, occupation, or pursuits, he would be 'wholly disabled from following his usual business, occupation, or pursuits,' and entitled to the stipulated compensation. Our judgment must therefore be for the plaintiff."

"Wholly disabled" is equivalent to quite disabled, and a man is so unless he can do what he is called upon to do in the ordinary course of his business. It is not the same thing as "unable to do any part of his business."¹ Where the policy provided against liability unless for injuries which totally disabled the insured, and prevented him from the transaction of all kinds of business, it was held that the language was clear and explicit, and that an instruction that the plaintiff might recover, though able to do some part of his accustomed work, so long as he could not to some extent do all parts, and that the ability of the insured to engage in some business would not prevent recovery unless it was one which he was qualified to engage in as an occupation, and transact in the ordinary way, was erroneous. Under such a policy there can be no liability for partial disability.²

§ 523. **Accident; Total Disability.** — A case was recently presented in New York where there was a succession of accidents. The insured sprained his knee, not, however, so severely that it compelled him to suspend his usual work, which he continued for some two weeks, when a wrenching of the

¹ Per Wilde, B., in *Hooper v. Accidental Death Ins. Co.*, 5 H. & N. 546.

² *Lyon v. Railway Pass. Ass. Co.*, 46 Iowa, 631.

same knee compelled him to quit labor, and totally disabled him for some time; and it was held that though if it had appeared from the nature of the first injury that the insured would at some time become incapable of labor from it, he might perhaps have recovered, notwithstanding the supervention of the second injury. Yet, as he actually continued his work after the first injury for sixteen days, and until the happening of the second injury, it could not be said that he became totally disabled by the first.¹ [Where the policy allows recovery only in case of "*total* disability" for "the prosecution of *any* and *every* kind of business pertaining to his occupation," it is error to charge that the plaintiff may recover if he was rendered unable "to do his accustomed labor, that is, *all kinds* of his accustomed labor to some extent."² But the clause "immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured," is satisfied, if the insured is, by the injury, rendered unable to do *all the substantial acts* necessary in his business. It is not necessary for him to show that he was disabled to such an extent that he had no physical ability to do *anything* in the prosecution of his business.³ Where the insured is described as a "leather cutter and merchant" and is to receive indemnity if disabled by accident from pursuing his "occupation," he must show disability both as a leather cutter and as a merchant.⁴]

[§ 523 A. Act aside from Occupation; Fits plus Accident; Accident plus Cold; "Inhaling Gas;" "Death within ninety days."—Operating a buzz-saw not being incident to the occupation, named in the policy, that of a retired gentleman, and being dangerous, the insured cannot recover for an injury received while so employed.⁵ A policy excepting death "arising from fits," acting directly or jointly with accidental

¹ Rhodes v. Railway Passengers' Ass. Co., 5 Lans. (N. Y.) 71.

² [Saveland v. Fidelity & Casualty Co., 67 Wis. 174, 177, and cases cited.]

³ [Young v. Travelers' Ins. Co., 80 Me. 244.]

⁴ [Ford v. U. S. Mut. Accident Relief Co., 148 Mass. 153.]

⁵ [Knapp v. Preferred Mut. Acc. Ass., 53 Hun, 84.]

injury, was held to cover a case where the insured was seized with a fit and fell under the wheels of an engine.¹ Where after an accident, death was caused by pneumonia caused by a cold which would not have been fatal but for the weakness produced by the accident, it was held within an accident policy.² An accident policy provided that it did not extend to death by "inhaling gas." The insured was found dead in his bed, the gas having been in some way turned on. The court held that the inhaling of gas excepted in the policy was a voluntary inhaling only, and that the present case was not within the exception, another curious case of twisting language out of shape to favor the individual at the expense of the corporate life.³ If the policy limits the liability of the company to deaths, occurring within ninety days after the accident, it is a perfect defence for the company that a longer period than ninety days intervened between injury and death. And this is true even though the company had no right under its constitution to insert such a clause. The plaintiff must stand on the contract as made or he has no contract to rest upon. He cannot reject one portion of the contract as made and claim the benefit of the rest of it.⁴

§ 524. **Accident; Travelling; Alighting; On Foot; Conveyance.**—A person may be said to be travelling in a carriage while alighting therefrom, until he has completely disconnected himself and landed. And an accident happening to the insured after the train has stopped at the station by slipping off the step of the car, is a railway accident "in a carriage on a line of railway."⁵ And so one is "travelling in a conveyance" provided for the transportation of passengers, if, while in the prosecution of the journey had in view when the insurance was procured, he elects to go on foot, this being

¹ [Lawrence v. Accidental Ins. Co., 7 Q. B. D. 216. What is this but making a new contract for the parties?]

² [Isitt v. R. R. Pass. Ass. Co., 22 Q. B. D. 504.]

³ [Paul v. Travelers' Ins. Co., 112 N. Y. 472.]

⁴ [Palmer v. Commercial Ass. Co., 53 Hun, 601; see § 535.]

⁵ Theobald v. Railway Passengers' Ass. Co., 26 Eng. L. & Eq. 432; s. c. 10 Exch. 44.

a. usual mode of making the transit from the steamboat wharf to the railroad station, although a conveyance by means of public hack may be had for hire by travellers so desiring to make the transit, which he might have taken.¹ In this case the plaintiff was in the prosecution of his journey, and while proceeding on foot in the evening slipped and fell. The court below held that the plaintiff could not recover, but seemed to be of the opinion that if he had taken a hack, and the accident had happened during the transit, he could have recovered. The case was distinguished from 'that of Theobald v. The Railway Passengers' Assurance Company,'² by the fact that in that case the passenger was in the carriage, while in this case he was not. But the Appellate Court did not recognize the distinction, and held that the distance walked, if in the prosecution of the journey, and a usual mode of such prosecution, was immaterial. It may be added, that, if accident in such a transit is not covered by the policy on the ground of the distinction attempted between the English and American cases, and on the ground that in the latter case there was no actual connection with the carriage at the time of the accident, it would seem that the plaintiff could not recover, even had he taken a hack; if the accident had happened during the transit on foot from the deck of the steamer to the hack, such a rule would exclude all accidents while the passenger is on foot, though these perhaps are of most frequent occurrence, and even though they might happen in changing cars, or in passing to or from the cars at a station where a passenger may have alighted to obtain refreshment. Construing the policy so as to carry into effect the intention of the parties, inferrible from the language used as interpreted by the light of extrinsic facts presumably well known to, and taken into consideration by, both the parties, these incidental and necessary parts of the journey must be considered as covered by the policy.³

¹ Northrup v. The Railway Passengers' Ass. Co., 43 N. Y. 516; reversing s. c. 2 Lans. (N. Y.) 166.

² *Ubi supra*.

³ Northrup v. The Railway Passengers' Ass. Co., 43 N. Y. 516.

[§ 524 A. Getting on a Moving Train; Standing on Platform. —

A condition against liability, if the insured (except a railroad employee) is injured while getting on a moving steam vehicle, is valid, and a breach of it by a banker insured as such avoids the policy.¹ A petition alleging that the plaintiff fell into a doze and unconsciously walked on the platform of the car, and so was injured, sufficiently shows that the injury was not "self-inflicted" or the result of "voluntary exposure to unnecessary danger."² One who stands on the platform of a railway car in violation of a known rule of the company is negligent and cannot recover for injury from being thrown from the steps under an accident policy requiring care.³ A passenger who goes on to the platform of a railway car because he is overcome with heat or nausea, does not voluntarily expose himself to unnecessary danger within the meaning of an accident policy, nor can it be said that such conduct is a violation of "a rule of a corporation" where the rule is continually disregarded by both passengers and trainmen.⁴ If, however, the policy specifically excepts injuries resulting from being on the platform of a moving car, the exception is good.⁵]

§ 525. Accident; Travelling in Public; Conveyance Alighting; Limit of Journey; Negligence. — Upon the questions whether the insured is actually a traveller, and in a conveyance, the very recent and interesting case of *Tooley v. Railway Passengers' Assurance Company*⁶ is also precisely in point. In that case the policy provided that the insurers should be liable for injuries "when accidentally received by the assured while actually travelling in a public conveyance, provided by common carriers for the transportation of passengers." The assured took passage from Chicago, having purchased a ticket for Kankakee. The train stopped at that place, and he alighted, standing in the door of the depot

¹ [Miller v. Travelers' Ins. Co., 39 Minn. 548.]

² [Scheiderer v. Travelers' Ins. Co., 58 Wis. 13.]

³ [Bon v. Railway Pass. Ass. Co., 56 Iowa, 664.]

⁴ [Marx v. Travelers' Ins. Co., 39 Fed. Rep. 321 (Col.), 1889.]

⁵ [Hull v. Equitable Acc. Ass., 18 Ins. L. J. 778 (Minn.), July 15, 1889.]

⁶ U. S. C. Ct., Southern Dist. Ill., 2 Ins. L. J. 275.

while the engine took water, until the train started, moving slowly to the coal-house for the purpose of taking fuel, when he walked rapidly or ran to the train, and reaching the forward platform of the rear car, threw out his hand as if attempting to get on board, when he fell between the cars and was run over, receiving injuries from which he soon after died. It was claimed that this was not an accident within the view of the policy, because it was not *in* a conveyance. But the court instructed the jury that "travelling in a public conveyance" could not be literally construed, and that, if the accident happened while the insured was either getting on or off the train, or attempting to do so for any reasonable purpose incident to railway travel, it came within the terms of the policy.¹ As the point is one now undergoing discussion, we give the most important parts of the charge, which was by Drummond, J.:—

"There are some general facts which cannot be controverted. John Tooley, on the 24th day of January, 1871, took from the agent of the defendant, at Quincy, Illinois, two policies of insurance at three thousand dollars each; that amount was to be paid on each policy in case of the death of Tooley within two days. It was provided that the liability should not exist unless while he was actually travelling in a public conveyance of common carriers, and in compliance with the rules and regulations; and besides, he was not to neglect the use of due diligence for self-protection.

"Tooley, on the afternoon of the 25th of January, took the Champaign accommodation train at Chicago, and proceeded to Kankakee, where the train arrived shortly after seven o'clock. It seems the practice was for the train to stop at the station, and then pass on to the coal-bin, *provided* they took the entire train beyond Kankakee. Accordingly, on this evening the train stopped at the station, and several persons left the cars, Tooley among others. The train remained at the station several minutes and took in water. The bell was then rung, the conductor signalled with his light, and the train went on to take in coal. There was a platform extend-

¹ See also *Champlin v. Railway Pass. Ass. Co.*, 6 Lans. (N. Y.) 71.

ing from the station-house, alongside of the railroad track, toward the water-tank and coal-bin. When the train moved on, Tooley, who was standing by a door of the station-house, started forward on this platform to overtake the train. When he reached the train, he extended his hands to grasp the car-rails, and fell between the two passenger cars,—the train consisting of an engine, tender, baggage car, and two passenger cars. A car passed over him, and he was killed. The first question is, What was the measure of responsibility of the defendant under these policies of insurance? The language of the policies is, ‘Provided always that this insurance shall only extend to bodily injuries, fatal or non-fatal, as aforesaid, when accidentally received by the insured while actually travelling in a public conveyance, provided by common carriers for the transporting of passengers in the United States or the Dominion of Canada, and in compliance with all rules and regulations of such carriers; and not neglecting to use due diligence for self-protection.’

“These are the only conditions material to be considered in the examination of this case. Tooley must have been actually a traveller in or upon the train; but it cannot be said that the responsibility ceased whenever he stepped out of the car to alight at a station, and that it never became operative again until his foot entered the car to resume his journey. That would be giving too narrow a measuring to the clause of the policy. We think that the fair construction of the liability assumed by the defendant in this respect was, that it included injuries received by Tooley while necessarily getting on or off the train as a traveller upon it.

“Secondly, and it is a question of fact to be determined by the jury, Was Tooley, at the very time that the injury was received by him, a traveller on the train? And this will depend upon the fact whether his journey terminated at Kankakee. It is claimed on the part of the defence that that was the termination of his journey; and if so, then he was not a traveller on this train at the time of the accident.

“I will call your attention to some of the facts having a bearing on this question. The conductor states, in his evi-

dence, that when he took up the tickets of the passengers, Tooley's ticket was only for Kankakee. That is a fact proper to be considered by the jury, in order to determine whether or not his journey extended beyond Kankakee, — not conclusive, of course, because, as a matter of experience, we know that where men commence a journey, they do not always buy their ticket to the termination of the journey, and various circumstances may happen during the progress of a journey which change the purpose of the traveller. He may start with the intention of only proceeding to a certain point. During the journey he may change his mind and proceed further on. There are many reasons, to which it is unnecessary to call your attention, which indicate that this is only one incident having a bearing upon the main fact of this part of the case, whether or not his journey terminated at Kankakee.

“ Mr. Merwin states in his evidence — the truth of which is a question for the jury — that, in a conversation he had with Tooley, he said that he intended or expected to go to Mattoon, which was south of Champaign where the train stopped. The way that arose was this: it was in relation to the seats; he wanted two seats, as he said, so that he could sleep, as he ‘thought or expected to go to Mattoon.’

“ Now as qualifying this, perhaps, and to some extent inconsistent with the statement of Merwin, is that of the conductor. The conductor says that twice, just before they arrived at Kankakee, he woke up Tooley, and told him that the next station was Kankakee; and there was no remark made by him intimating in any way that he intended to go further than Kankakee, and therefore it was not necessary for him to be disturbed. It is for you to say how much bearing this may have upon the question whether his journey terminated at Kankakee, and how far it may affect the statement of Merwin. There is this other fact, that when the train started at Kankakee, Tooley attempted to get on it. That is claimed to be conclusive evidence of his purpose to proceed further. It is for you to say what bearing that may have upon this particular question that we are now

considering. Then, again, in relation to whether or not he had any baggage with him. It is said that there was a satchel or valise there, and that it was not found after his death. How far this may have any bearing upon the question is a matter to be determined by the jury. The only light in which it is material this question should be considered is, how far it may affect the conduct of Tooley on the general question of negligence. If his journey ceased at Kankakee, then it cannot be claimed, under the undisputed facts of this case, that the defendant would be liable, because, on the assumption that he was going no further than Kankakee, in attempting to get on the train as he did, it was at his own risk.

“If he was going beyond Kankakee on the train, then there are other considerations which may affect the question of negligence. According to the view which we take of the contract between the parties, if he were a passenger proceeding beyond Kankakee on the train, he had the right to leave the car at Kankakee and return to it; that is to say, he had the right to get off of the train,—he was not bound, in other words, to remain inside of the car all the time. There is, perhaps, one circumstance which I ought to refer to in connection with the question of the termination of the journey at Kankakee, and it is this: that he did not purchase a ticket at Kankakee, and it is in evidence that the train stopped there several minutes; and if you believe the testimony on this point, he certainly had ample time to purchase a ticket before the train started on to obtain coal. Still that, of course, is not conclusive. He had the right, I suppose, under the practice and management of the train, to pay his fare on the cars. It is only a circumstance to be taken into consideration by the jury. One of the conditions of these policies, is, as has been stated, that Tooley should comply with all the rules and regulations of common carriers. We are not prepared to say that it was incumbent on him, under the circumstances of the case, to make himself acquainted with all the rules which might be contained upon the time-card. We must give this clause of the policy a reasonable construction. A

policy was issued, we suppose, to any applicant. It is what is called an accident policy, and we are to infer that the meaning of this clause was that the traveller should only make himself acquainted with those general rules, as to the management of the trains, and the conduct of railroads, which are presumed to be known to travellers, under these circumstances. For instance, Tooley, as far as we know, was a stranger on this road. We cannot say that when he went on the train he was obliged, because of this clause in the policy, to examine the time-card and ascertain all the minutiae connected with the management of trains, but only such rules as a general traveller might be presumed to know and ought to know. Any other construction than this would operate as a snare upon travellers. To hold that the traveller must become acquainted with every minute rule which may be prescribed on the back of a time-card, we think cannot be said to be the true meaning of this clause of the policy. But perhaps if he did not know the time the train stopped at a particular place, there might be a question whether it was not his duty to make some inquiry of the employees of the train, the conductor, or others.

"It is to be observed, in deciding this question of the negligence of Tooley, which is the last question to be considered, and to which I call the attention of the jury, that this is not an action between the representative of Tooley and the railroad, but between the representative of Tooley and the underwriters upon this clause in the policy, 'not neglecting to use due diligence for self-protection.'¹ And perhaps there can be no better rule stated than that which was agreed upon by the counsel, namely, that it was his duty to use that degree of caution and diligence which a prudent man would use under the circumstances in which he was placed; we think, also, in order to determine this question of diligence on the part of Tooley, it is proper to take into consideration whether or not, when he alighted at Kankakee, which he had a right to do, any notice was given of the movement of the train. That may be an element which may have

¹ *Post*, § 531.

a bearing upon the question whether he was negligent or not. Was there any notice given, either by the ringing of a bell, or by word of mouth from the conductor or any of the employees of the company? If a person, having a right to leave a train at a station, is informed or notified in any way that the train is going to start, and an opportunity given to him to take his place again upon the train, and he chooses to remain until the train is put in motion, and then is injured in getting on the train, it may be said that he is negligent,—in other words, that he takes the risk of getting on the train while thus in motion. But if, having alighted at a station, he has no notice given to him of the movement of the train, or he has not the opportunity, after notice is given, to get on the train, and intending to go further he attempts to get on the train and is injured, we think there is not the same measure of responsibility upon him,—in other words, that the question of negligence is not to be tried by the same tests precisely, because we must make some allowance under some circumstances. It would be natural for a man,—for even a prudent man,—intending to go farther on the train, to make an effort, even when the train is in motion, to regain his place on the train.

“But while that is so, it is to be understood he must use due diligence in trying to get on the train, and to that question I will now direct your attention for a few moments, on the supposition that he intended to go farther, and he had not an opportunity to get on the train, or he was not notified that the train was about to move. It was after seven o'clock in the evening. Tooley proceeded along the platform. There has some question been made whether the bell was rung. We think it perhaps ought to be assumed in this case that that fact has been established. It is proved that that was the practice of the engineer just before the train started; that it was a signal to the conductor that the engineer was ready to proceed. It is also distinctly sworn to by the conductor that the bell was rung, and it is a fact stated by one or two of the witnesses that the remark was made, ‘the bell is ringing,’ which, under the circumstances, of course is a very material

fact. This is not otherwise contradicted than by the statements of several witnesses that they did not hear, or do not recollect that they heard, the bell. However, we leave this question to be determined by the jury. Of course, negative testimony is not so material or important as positive testimony, if you believe that these witnesses stated the truth. There is some controversy as to the character of the night. Several of the witnesses say that it was a clear night; some that it was moonlight; and some state that it had been snowing or storming. There is no doubt of this fact, or I think we may assume it, that the intent of Tooley was, when he heard the bell, or an intimation was given in that way, or by the movement of the cars, to get on the train. He proceeded rapidly along the platform. He tried to get on the train. Now, did he act prudently, as a prudent man, in getting on the train? Mr. Lawrence says, when he came around the corner of the station-house and he saw a man running or walking fast, that he called out to him that the train was only going to coal up, or something to that effect. Now it is true that Mr. Tooley was not bound to take any declaration made by an outsider or an indifferent person as true, in relation to the train or its motions. The only effect of that is this: that it changes the measure of his responsibility, and gives color to his conduct, to his action. And you are to treat it in a different manner from what you would, provided he had no intimation whatever given to him; because, if a man, after being notified of a particular fact which should govern or rule his conduct, chooses to act in such a way as to encounter risk or danger, you will see that the rule of diligence is different. It is material for the jury to consider this in that light alone. And then it will be a question, as far as it bears upon the conduct of Tooley, whether or not he heard what was said by Mr. Lawrence, and of course it is simply a matter of inference whether or not he did hear; positively we cannot know. This seems to be certain, that words or the sound attracted his attention as he turned round; and it is for you to say whether he heard, in such a way as to give him warning, that the train was not to go farther than the coal-bins,—whether or not he heard

the language, or whether he heard a sound merely, without distinguishing or understanding what was said. All these are to some extent matters of conjecture, and it is for the jury to determine how far they may affect this question. He passed by the rear platform of the rear car; we think that is a fact to be taken into consideration by the jury in determining whether he did or did not act as a prudent man, if he believed that the train was going on, and wanted to get on the train to resume his journey. Of course you will understand that the danger was much less in getting on the rear platform than on the forward platform of the car. The fact is, that he did not attempt to get on the rear platform of the car. The train was moving slowly. It does not appear that he was actually running, although walking very fast. He attempted to get on to the cars, either on to the forward platform of the rear car, or between the two cars. If, in point of fact, when he slipped and fell, he was attempting to get on between the cars, it is difficult to reconcile it with our ideas of prudence on the part of any man under such circumstances. That may be an important fact for you to inquire into,—whether that is so or not, as I believe it is stated by one of the witnesses. It is very much a question for the jury, under these rules which the court has laid down, whether this man, under the circumstances, conceding that he was going further, acted prudently; whether or not he was guilty of negligence.”

§ 526. **Accident; Travelling; Conveyance; Engineer.**—A railway passenger's insurance company which insures against “any accident while travelling by public or private conveyance,” is liable for the death of an engineer actually engaged in running trains, by an accident occurring on the railroad upon which he is employed. So it was held in *Brown v. The Railway Passengers' Assurance Company*.¹ “The main point,” say the court, in giving the opinion, “is whether the intestate, Brown, was killed by an accident which is covered by the policy. The clause insuring him provides that the death must be ‘caused by an accident while travelling by public or private conveyance provided for the transportation of pas-

¹ 45 Mo. 221.

sengers.' It is strongly contended that a locomotive or engine is not a conveyance provided for the transportation of passengers. This is certainly true; and if the ticket applies solely and exclusively to passengers or travellers, the position that the company is not liable cannot be controverted. A passenger would have no right to go upon an engine, and if he was so indiscreet as to venture on such a place, and injury ensued, he would not be protected. But this ticket was designed to include and serve something more than the ordinary risk incurred by the passenger or traveller. The locomotive is a necessary part of the conveyance. The ticket was a general ticket, as contradistinguished from a mere passenger or travelling ticket. The premium on one is double what it is on the other. When the ticket was sold it was known that Brown was an engineer, and the conclusion is unquestionable that he believed that he was insured while pursuing his employment or occupation. The company so thought; for it gave no instructions against insuring railroad employees till after the disastrous accident happened. . . . As Brown was not insured as a passenger or traveller, but against all accidents without regard to the capacity in which he was acting, the reasonable inference is, that the ticket was intended to cover the risk and accident by which he met his death. If it be conceded that the meaning of the ticket is doubtful or ambiguous, still the question must be decided for the plaintiff, as the promisor could not fail to apprehend that the promisee labored under the impression that he was indemnified, and where such is the case, the construction must be most favorable to the insured."

§ 527. The case cited in the last section has been criticised,¹ as founded upon an obvious misapprehension, the court having mistaken a "traveller's risk," which this was, for a "general accident" risk, which it was not. However this may be, it seems well decided upon the contract itself. The insured was clearly travelling by a conveyance provided for the transportation of passengers, unless it be said that a person whose business requires him to travel all the time is less a traveller

¹ See American Law Review, July, 1873, art. Accident Insurance.

than one whose business requires him to travel only occasionally. He may not have been a passenger, but he clearly was a traveller, liable to all accidents which threaten travellers, and presumably purchasing under the same contract the same protection. Would it be pretended that a stage-driver purchasing a like ticket at the same time with the passengers is not entitled to the same protection? The suggestion of the court, that the engineer had greater rights under such a contract than a passenger would have, seems more open to criticism. Though the court seems to have conceded, inadvertently, perhaps, that a locomotive is not a conveyance, it almost immediately adds, what is obviously true, that a locomotive is a necessary part of the conveyance. Certainly cars without a locomotive could not be said to be a conveyance provided for the transportation of passengers, any more than a carriage without a horse, or a steamboat without an engine. No doubt all the parts of a train of cars constitute the conveyance, and unless the insured is restricted by the terms of the contract to some particular part, it would seem that whoever holds a ticket may recover without reference to the particular part of the conveyance he may have been on at the time of the accident. If he be anywhere on the conveyance — even though negligently, yet without misconduct or fraud¹ — at the time of the accident, he is within the terms of the contract; so that whether the passenger be on the engine, or the engineer on some other part of the train for the time being, their rights and obligations under the contract being the same, would be questions of no moment. There seems, therefore, to be no ground for the distinction suggested between the rights of a passenger and those of the engineer, unless there is something in the contract to require it. Even under the very doubtful² doctrine of contributory negligence, though, perhaps, the passenger might fail to recover, so also might the engineer, if the accident happen by reason of his being somewhere else than upon the engine. Certainly an insurance company ought not to be allowed to issue such a ticket to an

¹ See *ante*, §§ 408–411, and *post*, § 529.

² See *post*, § 529.

engineer, known to be such, and then to say if he stays upon the engine and attends to his duties he is not within the terms of the policy, but if he does not stay upon the engine, then the accident happens through his neglect, and therefore he cannot recover, unless the policy which they have issued gives them such advantages in terms so clear and unequivocal as to admit of no other possible construction.

§ 528. **Accident; Travelling on Foot; Conveyance.** — On the other hand, it has been held that travelling on foot is not travelling by private conveyance within the meaning of a policy insuring against accidents while “travelling by public or private conveyance.” In this case, the plaintiff had completed the greater part of his journey by steamer, and there being no public conveyance, was proceeding on foot to his home some few miles distant from the port where he left the steamer.¹ Conveyance, as a mode of travelling, in its ordinary and popular acceptation, it was said in that case means a vehicle or instrument of conveyance other and different from the person or thing to be conveyed; and it cannot properly be said that a man walking on foot is a private conveyance to himself. And this case was affirmed in the Supreme Court of the United States,² Chase, C. J., giving the opinion, which, after stating the case, concluded as follows:—

“The question is whether, when he (the plaintiff) received the injuries, he was travelling by public or private conveyance. That he was *travelling* is clear enough; but was travelling on foot travelling by public or private conveyance? The contract must receive the construction which the language used fairly warrants. What was the understanding of the parties? or, rather, what understanding must naturally have been derived from the language used? It seems to us that walking would not naturally be presented to the mind as a means of public or private conveyance. Public conveyance naturally suggests a vessel or vehicle employed in the general conveyance of passengers. Private conveyance suggests a vehicle

¹ Ripley *et al.* Adm. *v.* Railway Passengers' Ass. Co., 2 Big. Life & Acc. Ins. Cas. 738; Ripley *v.* Insurance Co., 16 Wall. 336.

² 16 Wall. (U. S.) 336; s. c. 3 Big. Life & Acc. Ins. Cas. 832 and note.

belonging to a private individual. If this was the sense in which the language was understood by the parties, the deceased was not, when injured, travelling within the terms of the policy. There is nothing to show that it was not."

§ 529. **Same Subject.** — Such, undoubtedly, is the logical consequence of a strict interpretation of the letter of the contract, and the exact point made was doubtless well decided. But we venture to suggest the inquiry whether the construction is not too literal and narrow. Upon the principle of the cases cited in the last two sections, the plaintiff being engaged in the actual prosecution of his journey, and by the appropriate and usual means, might have been held to be travelling by public conveyance, for it was by public conveyance that the journey was accomplished. And this is strictly in accordance with the ordinary use of language. A man who goes on a journey is said to be travelling. If he goes by rail or steamer, he is travelling by public conveyance. More or less travel on foot is necessary to this mode of travel in changing cars, or passing from steamer to railway, or in getting to and from the stations. But, in a general sense, all this is travelling by public conveyance. It would seem to be immaterial whether the walking be done in the middle or at one of the termini of the journey, provided it be incidental to, and part of, the journey; nor can the distance walked make any difference, provided it also is a part of the journey. By the same literalness of construction a passenger sitting still in a train stopping at a station, and not under motion, might be injured by a train in motion, and yet have no claim, because he was not actually travelling,—for sitting still is not literally travelling. So a passenger required to leave one car and to get into another, or to go from one train to another at the same station, or going to, or returning from, the refreshment room, being on foot during the process, is certainly not literally "in a conveyance." But is he not travelling all the while, in a general and substantial sense, in the prosecution of his journey, in and by a public conveyance? Is not one who stands upon the platform at a way station, having left the car for refreshments, and is knocked down and injured by the rushing

throng, within the protection of such a policy, although at the moment, in a literal sense, he is neither travelling by a conveyance, nor in any other way? May not a man be said to be travelling by public conveyance who is actually engaged in and about doing certain acts which are fairly incidental to, and necessary for, the prosecution or completion of the journey? The bare question whether a man going on foot is going by conveyance must undoubtedly be answered in the negative. But the broader question, whether a man who is prosecuting a journey by railway and steamboat, while engaged in what is incidental to the journey, whether he is sitting still in a motionless car, or standing still on the station platform, or walking to and fro thereon, waiting for a start, or going into the station for refreshments, or returning therefrom after having obtained them, is not in a reasonable and substantially accurate sense "travelling by public conveyance," may, perhaps, require an affirmative answer.¹

§ 530. **Accident ; Negligence ; Wilful Exposure ; Violation of Law ; Obvious Risk.** — It has been held that if the injury is attributable to the insured's own negligence, it is not accidental, as when a passenger inadvertently, but needlessly, puts his arm out of the car-window while the train is running with its usual velocity, whereby his hand is injured by contact with a post standing near the track.² And the case of *Theobald v. Railway Passengers' Assurance Company*³ has been supposed

¹ Since this chapter was printed, the case of *Champlin v. Travelers' Passenger Ins. Co.*, 6 Lans. (N. Y.) 71, has come to hand, in which it is expressly decided that the doctrine of contributory negligence on the part of the plaintiff does not apply as a defence in actions on policies of insurance. In the same case, it appearing that the insured attempted to jump on to an omnibus — a public conveyance used for carrying passengers — while it was in motion, that he succeeded in getting on to the steps, which were at the rear of the omnibus, but was unable, by reason of the jar of the vehicle, to maintain his footing, and received injuries of a serious nature, from hitting his knee against the wheel, it was also held that the insured was travelling. "It would be a very strained construction," say the court, "of a contract like this to hold that he was not travelling. If he was not travelling, it is difficult to say what he was doing. We think that as he was actually going from one place to another, he was travelling." See also *Gallin v. Lon. & Co. Ry. Co.*, L. R. 10 Q. B. 212.

² *Morel v. The Mississippi Valley Life Ins. Co.*, 4 Bush (Ky.), 535.

³ 10 Exch. 44; s. c. 26 Eng. L. & Eq. 432.

to support the same doctrine. But the point was not decided, the court merely adverting to the fact that the plaintiff was without negligence. In *Brown v. Railway Passengers' Insurance Company*,¹ it was also suggested that the negligence of a passenger having a "traveller's ticket" might defeat his recovery. But that was not a point in the case; and the case from Kentucky stands alone, without the support of any authority, and is based, it is conceived, upon a mistaken application, in an action upon contract, of the doctrine of contributory negligence as it is applied in actions upon tort. Indeed, there is no reason for supposing that protection from loss or injury from negligence is not one of the motives which operate in accident, as well as in fire and life insurance. And unless there are stipulations to the contrary in the policy, in accident insurance, as in life and fire insurances, injury by negligence is covered by the contract;² nor will ordinary negligence vitiate a policy which stipulates that the company will not be liable for wilful and wanton exposure to unnecessary danger, as this stipulation affords a reasonable inference that ordinary negligence is not excepted.³ In this case the plaintiff attempted to get upon a train of cars while they were in slow motion, and fell under them and was killed. The opinion of the court we give at some length, as involving an interesting discussion of the relation of negligence to insurance against accidental injury and death, the scope and meaning of the word "accident," and the grounds upon which the doctrine of contributory negligence, as applied in actions of tort, is not applicable in cases of insurance. The opinion was by Paine, J.:—

"The position most strongly urged by the respondent's counsel in this court was, that inasmuch as the negligence of the deceased contributed to produce the injury, therefore the death was not occasioned by an accident at all, within the meaning of the policy. I cannot assent to this proposition. It would establish a limitation to the meaning of the word

¹ 45 Mo. 221.

² See *ante*, § 408 *et seq.*

³ *Schneider v. The Provident Life Ins. Co.*, 24 Wis. 28.

‘accident,’ which has never been established either in law or common understanding. A very large proportion of those events which are universally called accidents, happen through some carelessness of the party injured, which contributes to produce them. Thus men are injured by the careless use of firearms, of explosive substances, of machinery, the careless management of horses, and in a thousand ways where it can readily be seen afterward that a little greater care on their part would have prevented it. * Yet such injuries having been unexpected, and not caused intentionally or by design, are always called accidents, and properly so. Nothing is more common than items in the newspapers under the heading ‘accidents through carelessness.’

“There is nothing in the definition of the word that excludes the negligence of the injured party as one of the elements contributing to produce the result. An accident is defined as ‘an event that takes place without one’s foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected.’

“An accident may happen from an unknown cause. But it is not essential that the cause should be unknown. It may be an unusual result of a known cause, and therefore unexpected to the party. And such was the case here, conceding that the negligence of the deceased was the cause of the accident.

“It is true that accidents often happen from such kinds of negligence. But still it is equally true that they are not the usual result. If they were, people would cease to be guilty of such negligence. But cases in which accidents occur are very rare in comparison with the number in which there is the same negligence without any accident. A man draws his loaded gun toward him by the muzzle, the servant fills the lighted lamp with kerosene a hundred times without injury. The next time the gun is discharged, and the lamp explodes. The result was unusual, and therefore as unexpected as it had been in all the previous instances. So there are, undoubtedly, thousands of persons who get on and off from cars in motion

without accident, where one is injured. And, therefore, when an injury occurs, it is an unusual result, and unexpected, and strictly an accident. There are not many authorities on the point. The respondent's counsel cites *Theobald v. The Railway Passengers' Assurance Company*,¹ not as a direct authority, but as containing an implication that the negligence of the injured party would prevent a recovery. I do not think it can be construed as conveying any such intimation. The insurance there was against a particular kind of accident, — that was a railway accident; and the only question was, whether the injury was occasioned by an injury of that kind. The court held that it was, and although it mentions the fact that there was no negligence on the part of the assured, that cannot be considered as any intimation what would have been the effect of negligence, if it had existed.

“The general question as to what constitutes an accident was considered in two subsequent cases in England. The first was *Sinclair v. The Maritime Passengers' Assurance Company*,² in which the question was, whether a sunstroke was an accident within the meaning of the policy. The court held that it was not, but was rather to be classed among diseases occasioned by natural causes, like exposure to malaria, &c.; and while admitting the difficulty of giving a definition to the term ‘accident’ which would be of universal application, they say they may safely assume ‘that some violence, casualty, or *vis major* is necessarily involved.’ There could be no question in this case, of course, but that all these were involved.

“In the subsequent case of *Trew v. Railway Passengers' Assurance Company*,³ the question was whether a death by drowning was accidental. The counsel relied on the language of the former case, and urged that there was no external force or violence. But the court held that if the death was occasioned by drowning, it was accidental, within the meaning of the policy. And in answer to the argument of counsel, they said: ‘If a man fell from a house-top, or overboard from a ship, and was killed; or if a man was suffocated by the smoke

¹ 26 Eng. L. & Eq. 432.

² 3 El. & El. 478.

³ 6 H. & N. 839.

of a house on fire, — such cases would be excluded from the policy, and the effect would be, that policies of this kind, in many cases where death resulted from accident, would afford no protection whatever to the assured. We ought not to give to these policies a construction which will defeat the protection of the assured in a large class of cases.'

"There was no suggestion that there was any question to be made as to the negligence of the deceased; and yet the court said: 'We think it ought to be submitted to the jury to say whether the deceased died from the action of the water, or natural causes. If they are of the opinion that he died from the action of the water, causing asphyxia, that is a death from external violence, within the meaning of this policy, *whether he swam to a distance and had not strength enough to regain the shore, or, on going into the water, got out of his depth.*'

"Now, either of these facts would seem to raise as strong an inference of negligence, as an attempt to get upon cars in slow motion. Yet the court said that although the drowning was occasioned by either one of them, it would have been an accidental death, within the meaning of the policy, and the plaintiffs entitled to recover. I cannot conceive that it would have made such a remark, except upon the assumption that the question, whether the injured party was guilty of negligence contributing to the accident, does not arise at all in this class of cases. I think that is the true conclusion, both upon principle and authority, so far as there is any upon the subject; and the only questions are, first, whether the death or injury was occasioned by an accident within the general meaning of the policy, and, if so, whether it was within any of the exceptions.

"This conclusion is also very strongly supported by that provision of the policy under which the plaintiff was nonsuited. That necessarily implies that any degree of negligence, falling short of 'wilful and wanton exposure to unnecessary danger,' would not prevent a recovery. Such a provision would be entirely superfluous and unmeaning in such a contract, if the observance of due care and skill on the part of the assured constituted an element to his right of

action, as it does in actions for injuries occasioned by the negligence of the defendant.

“The question therefore remains, whether the attempt of the deceased to get upon the train was within this provision, and constituted a ‘wilful and wanton exposure of himself to unnecessary danger.’ I cannot think so. The evidence showed that the train, having once been to the platform, had backed so that the cars stood at some little distance from it. While it was waiting there, the deceased was walking back and forth on the platform. It is very probable that he expected the train to stop there again before finally leaving. But it did not. It came along, and while moving at a slow rate, not so fast as a man would walk, he attempted to get on, and by some means fell either under or by the side of the cars, and was crushed to death. The act may have been imprudent. It may have been such negligence as would have prevented a recovery in an action based upon the negligence of the company, if there had been any. But it does not seem to have contained those elements which could be justly characterized as wilful or wanton. The deceased was in the regular prosecution of his business. He desired and expected to leave on that train. Finding that he would be left unless he got on the train while it was in motion, it was natural enough for him to make the attempt. The strong disinclination which people have to being left would impel him to do so. The railroad employees were getting on at about the same time. Imprudent though it is, it is a common practice for others to get on and off in the same manner. He had undoubtedly seen it done, if he had not done it himself, many times, without injury. I cannot regard it, therefore, as a wilful and wanton exposure of himself to unnecessary danger, within the meaning of the policy.”

And this case was cited and approved in the *Providence Life Insurance and Investment Company v. Martin*,¹ where the policy provided that the company should not be liable in case the insured received injury “by his wilfully exposing himself to any unnecessary danger or peril,” and where the

¹ 32 Md. 310.

facts were that the assured was a locomotive engineer, in the employ of a railroad company, whose principal business was the transportation of coal, and whilst backing his engine upon a down grade, with a car in front as a precaution to check the speed, he directed the fireman to run it, and went upon and over the tender to get into this car to draw the brakes, and in doing so slipped and fell between the car and the tender, and was instantly killed by the tender passing over his body. The speed at the time was about eight miles per hour, on a descending grade. It was also distinctly asserted, in this case, that contributory negligence was no defence, as the liability rests upon contract, one of the chief objects of which is to protect the insured against his own mere carelessness or negligence.¹

So where two persons were trotting horses for money — illegal by statute — and came in collision, whereupon one of

¹ And see also *ante*, §§ 301, 327-330, 408 *et seq.*, 525. To the same point is *Champlin v. Travelers' Passenger Ins. Co.*, 6 Lans. (N. Y.) 71; *ante*, § 529. In *Pratt v. Travellers' Ins. Co.*, a *nisi prius* case tried in the Supreme Court in New York, in October, 1871, cited by a very careful writer in the *American Law Review*, for July, 1873, under a policy which exempted the insurers from liability if the insured was guilty of a violation of any rule of any company, or in case of wilful exposure or want of due care, the jury were charged that if the insured was standing on the platform in violation of the rules of the railway company, he could not recover; if he was passing from one car to another, it was for them, upon all the circumstances, to say whether he used due care or not. And in another case cited by the same writer, *Hoffman v. Travelers' Ins. Co.*, in the same court, but on a different circuit, the court held, as matter of law, that attempting to cross a railroad track, when an approaching train was within fifty to one hundred feet, was a violation of a condition to use all due diligence for personal safety. It was "as gross negligence," the court is reported to have said, "as if the man had hanged himself." The facts were no doubt such as to have justified a jury in finding a verdict for the defendant; though upon the last proposition there might be a difference of opinion. The doctrine of the case cited in the next section seems the better. In *Lowell v. Accident Insurance Co.*, 3 Ins. L. J. 877, the jury found that walking on a railroad track on a dark and rainy night, at a time when the deceased knew that trains were frequently passing both ways, was not an "obvious risk;" but the Lord Chief Justice said, "Very well, that is a verdict for the plaintiff, but I shall stay the execution, and if the question is one of law for the judge, I should decide it quite the other way, for I should say the deceased was running a risk which was very 'obvious' indeed." The verdict was afterwards set aside. 5 Ins. L. J. 559. See also *Wright v. Sun Mut. Ins. Co.*, 29 U. C. (C. P.) 221.

the parties leaped to the ground, and while trying to stop his horse was injured, it was held that he could not recover under a policy which exempted the insurers from liability for accidents caused by "duelling, fighting, or other breach of the law."¹

§ 531. **Accident; Condition to be careful; Interpretation.** — But policies sometimes contain provisions which look to a protection from liability for injury by negligence, as, for instance, the stipulation that the insured shall be careful for his safety. What amounts to the violation of a stipulation in an accident policy that the insured shall "use all due diligence for his personal safety and protection," is to be deduced from all the facts and circumstances accompanying the accident, and, like questions of negligence and due care generally, is to be determined by the jury. The court will not undertake to say, as matter of law, whether a particular act, or series of acts, constitutes a want of such due diligence.² [The burden of proof is on the defendant to show that the insured did not use the "due care" required by the policy.³] If the policy excludes liability "while the insured is, or in consequence of his having been, under the influence of intoxicating liquor," it is immaterial that the accident was not the consequence of intoxication, if the insured was at the time of the accident under the influence of intoxicating liquor;⁴ that is, under such influence as to disturb the quiet, equable exercise of his intellectual functions. The purpose of such a provision is to guard against liability in both contingencies.⁵

[§ 531 A. **Voluntary Exposure to Unnecessary Danger.** — Driving alone at night across a network of railway tracks, where there is no road for carriages, is "voluntary exposure to unnecessary danger."⁶ Where at night the insured stepped off a railway train that had stopped on a drawbridge, and fell

¹ *Travelers' Ins. Co. v. Seaver*, 19 Wall. (U. S.) 531.

² *Adm'rs of Stone v. United States Casualty Co.*, 34 N. J. (5 Vroom) 371; ante, § 525.

³ [*Freeman v. Travelers' Ins. Co.*, 144 Mass. 572.]

⁴ [*Mac Robbie v. Accident Ins. Co.*, 23 Scot. L. R. 391.]

⁵ *Shader v. Railway Passengers' Ins. Co.*, 66 N. Y. 441; *Mair v. Railway Passengers' Ins. Co.*, 37 L. T. 356, C. P. D.

⁶ [*Neill v. Travelers' Ins. Co.*, 12 Can. Supr. Ct. 55.]

through a concealed hole, it was held that this was not a "voluntary exposure to unnecessary danger," as he had no notice of the danger, nor a violation of the provision against "walking or being on the road-bed or bridge of any railway," which was obviously intended to exclude injuries from passing trains.¹ A recovery cannot be defeated on the ground of voluntary exposure to a danger contemplated by the parties because pertaining to the business of the insured.²

§ 532. **Accident Insurance; Increase of Risk; Change of Occupation.** — A change of occupation on the part of a person insured against injury by accident, does not mean a casual change, such as most men do, or may resort to, during the intervals of time when their usual employment does not engage them, but rather "engaging in another employment as a usual business." An unemployed teacher, therefore, does not forfeit his right to recover because he meets with an accident while superintending the erection of a building for himself.³ Nor does a person who, while on a visit to a friend who was a farmer, meets with an accident while casually assisting him in getting in hay, though farming is not his usual occupation.⁴ A statement by the insured in his application as to his occupation is a representation of the then existing fact, and not a covenant or warranty that there shall be no change in the occupation affecting the risk during the currency of the policy. And a change in the occupation, as, for instance, from the occupation of a switchman to that of a brakeman, whether affecting the risk or not, does not avoid the policy, unless expressly so stipulated, or unless liability is restricted to accidents occurring in the course of the occupation specified in the application.⁵ And for the same reasons an engineer on a railway train may temporarily perform the duty of an absent brakeman without forfeiting his right to recover.⁶

¹ [Burkhard v. Travelers' Ins. Co., 102 Pa. St. 262.]

² [National Ben. Ass. v. Jackson, 114 Ill. 533.]

³ Admr's of Stone v. United States Casualty Co., 34 N. J. (5 Vroom) 371.

⁴ North American Ins. Co. v. Burroughs, 69 Pa. St. 43.

⁵ The Provident Life Ins. Co. v. Fennell, 49 Ill. 180.

⁶ Prov. Life Ins. & Inv. Co. v. Martin, 32 Md. 310.

§ 533. **Accident ; Increase of Risk ; Classification of Risk.** — In *Stone v. United States Casualty Company*,¹ where the policy required notice of change of occupation “to a more hazardous exposure under the company’s classification than is named in the application,” the form and effect of the following indorsement upon the policy, — “Policy-holders insured under the preferred class will not be entitled to recover for injuries received in any employment, or by any exposure, either more hazardous in itself, or classified by the company as more hazardous, than the occupations named in the preferred class,” — came under consideration, and the conclusion was, first, that the language has respect to hazardous employments, and not to hazardous individual acts ; and, secondly, that being so indorsed on the policy, it constitutes no part of the contract. “The injuries excluded from the compensation of the policy,” say the court, by Beasley, C. J., “are described as those that are ‘received in any employment, or by any exposure either more hazardous in itself, or classified by the company as more hazardous.’ These terms, literally rendered, require that the assured, to come within their effect, must, at the time of the injury, be in an employment more dangerous than his own. The language has respect to employments, and not to individual acts. It is true that a certain degree of ambiguity is introduced by the expression ‘other exposure,’ but, looking at the body of the policy, we find these terms used in the sense of the risks arising from a business or occupation. By adhering to the literal signification of the terms employed, these indorsements prefixed to the several classes of employments lose all force as independent stipulations, and serve the simple purpose of graduating such employments for the service of that provision of the policy which prohibits the assured from passing, at his own option, from one business to another. Understood in this view, they are properly a part of the classification, but if they are to be received as containing new terms of the contract, they are entirely out of place. If the company intended to say to the assured that if he did any act which did not strictly belong to his own occupation, but was

¹ 34 N. J. 371.

embraced more properly in some other business, and if thereby any harm to him accidentally resulted, that in such event he could claim nothing under his policy, it was easy for them to do so in plain language. Such a stipulation would obviously be one of a very important character, and we would expect to find it in the body of the instrument. A qualification of the agreement so restrictive of the rights of the party insured ought not to be admitted, unless the terms of this indorsement will bear no other rational interpretation. If the terms used are imperfect or ambiguous, it is the fault of the defendants; it is their contract, and the construction of it must be strongly against them, *contra preferentes*. Nor do I think the liberal interpretation of this clause, which the defence contends for, a practical one. It would be difficult to put it in practice; for who can say, in many cases, what acts are properly incident to one occupation, and which are not so to any other? The subdivisions of employments are so numerous and minute, that in actual life it is impossible to separate them by any visible and exact line; for instance, in the first of these classifications the shopkeeper is placed, and in the second, the laborer. The employments of these are distinct; but with respect to particular acts it would be extremely difficult, if not impossible, to classify them into those which are common to both occupations, and into those which are peculiar to each. It does not seem to me proper to bring into this agreement this confusion and uncertainty by construction. It certainly is not necessary for the reasonable protection of the company, for there are other restrictions in this instrument which are, apparently, sufficient to debar a party insured from doing acts appertaining to other occupations, which are of a particularly hazardous nature. I refer to the clauses referring to undue exposure. Even the case put of an attorney driving a steam-engine would probably come within this prohibition.

“But there is still another, and, as it seems to me, a decided objection against the admission of this indorsement, as constituting in itself a substantive agreement. That objection is this: that considered in this light it cannot be received as any part of the contract between these parties. As I have stated,

this clause is a prefix to the classification on the back of the policy, and such prefix is not referred to in the body of the instrument. The policy itself is very explicit as to what shall be comprised in the contract. Its language is, that this policy 'is issued and accepted subject to all the provisions, conditions, limitations, and exceptions herein contained or referred to, and upon the express agreement that the statements and declarations of the insured in his application for this insurance are warranted to be true in all respects, and that said application, together with the company's classification of hazards indorsed hereon, are referred to, and made a part of this contract.' This specification of the parts going to make up the agreement is clear, and it does not embrace this prefix in question, if such prefix is to be taken as a modification of the body of the policy in a most material respect. On these various grounds I incline to the view that the indorsement in question does not constitute a substantive stipulation, but is merely explanatory of the stipulations to the extent already indicated."

§ 534. **Accident; Extent of Risk.**—Insurance against injury by accident includes all accidents not excepted by the terms of the policy.¹ A general insurance, however, against death by "violent and accidental means," followed by a proviso that the insurers will not be responsible for death caused by certain specified means, or happening in certain specified modes, must be construed as covering injuries happening by violent and accidental means, and not by the causes and modes specified in the excluding proviso. The exclusion of responsibility for death or injury in certain specified ways does not enlarge the scope of the general clause so as to include cases happening otherwise than by violent and accidental means.²

§ 535. **Accident Insurance; Insurable Interest; Amount of Loss.**—Every person is presumed to have an insurable interest in his own life, and in his personal safety and security

¹ *Prov. Life Ins. Co. v. Fennell*, 49 Ill. 180; *Prov. Life Ins. Co. v. Martin*, 32 Md. 810.

² *Southard v. The Railway Passengers' Ass. Co.*, 34 Conn. 574, per Shipman, Judge of the District Court of the United States, acting as arbitrator, *ante*, § 515.

from injury.¹ And as the contract is not strictly one of indemnity, here as in life insurance the amount recoverable may be agreed upon by the parties, within such reasonable limits as will save the contract from being objectionable as a wager.² Where a policy insures for a stated period against two classes of accidental injuries, namely, those which occasion loss of life within ninety days, in a gross sum, and those which shall not prove fatal, in a certain sum per week for a fixed number of weeks, the two provisions are to be construed together. If an injury happens, it is insured against under one class or the other; and if a recovery cannot be had under the first class for the gross sum, then it may be had under the second class for the weekly allowance. If it were otherwise, an injury which should not prove fatal in ninety days would furnish no ground of action till it should be made to appear that it would never prove fatal, — a construction which would render the insurance nugatory in such cases.³ In such a case the lapse of the ninety days is to be determined by including the day when the accident happened as one of the ninety days, in accordance with the rule that when time is reckoned from an act done, it includes the day when the act is done, but when it is reckoned from the day when the act is done, the day is excluded. And a death happening within ninety days from the time of the accident, though after the expiration of the period covered by the insurance, if the accidental cause be within that period, affords ground for recovery.⁴ If the policy stipulated for the payment of a fixed sum in the case of death by accident, and for a proportionate sum in the case of merely personal injury, not fatal, the amount to be recovered is not to be estimated by the proportion which the injury bears to the amount payable in case of death. The insured may recover for the expense and suffering occasioned, but not for loss of time or profits. If recovery could be had for a consequential loss of profits, a person

¹ *Prov. Life Ins. & Inv. Co. v. Baum*, 29 Ind. 236.

² *Ante*, § 7.

³ *Perry v. Prov. Life Ins. & Inv. Co.*, 103 Mass. 242; *Same v. Same*, 99 Mass. 162.

⁴ *Ibid.*

whose time or business is more valuable than another's might, for the same injury, receive a greater remuneration. The insurers indemnify against the expense and pain and loss immediately connected with the accident, and not against remote consequences that may follow, according to the business or profession of the insured.¹

§ 536. **Accident; Notice of Death; Preliminary Proof.** — The general rules heretofore stated as to preliminary proof in other branches of insurance are also applicable here.² "Sufficient proof of the injury" does not include the mode and manner of the injury or its cause. Nor will a statement in the preliminary proofs of two inconsistent causes of the injury, the injury itself being correctly stated, prejudice the right of the insured to recover.³ In *Gamble v. Accident Assurance Company*,⁴ a stipulation that particulars of the accident should be furnished within a specified time, was a condition precedent to the recovery, and a non-compliance therewith was not excused by the intervention of a death so sudden that the condition could not be complied with.⁵ Notice of the death, required "as soon thereafter as possible," must be within a reasonable time; and what is a reasonable time is for the jury, if any facts from which the reasonableness of the time is to be inferred are in dispute, otherwise for the court.⁶ In *Insurance Company v. Morely* "no claim was to be made in respect of an injury unless the same shall be caused by outward and visible means, of which proof satisfactory to the company can be furnished." It was alleged that the insured accidentally fell down stairs, was severely injured, and died from the effects of the fall. No witness saw him fall; but

¹ *Theobald v. Railway Passengers' Ass. Co.*, 10 Exch. 45; s. c. 26 Eng. L. & Eq. 432.

² *Ante*, ch. xx.

³ *North American Ins. Co. v. Burroughs*, 69 Pa. St. 43.

⁴ *Irish Rep.* 4 C. L. 204.

⁵ But see *ante*, § 465.

⁶ *Prov. Life Ins. & Inv. Co. v. Baum*, 29 Ind. 236. And see also *ante*, § 462, and *post*, § 539. A delay of six days, when the accident happened in the place where the insurers had a resident agent, was held unreasonable. *Railway Pass. Ass. Co. v. Burwell*, 44 Ind. 460.

some days prior to his death he told his wife and son that he had fallen down the back stairs, and hurt himself very bad by hitting the back of his head. This evidence was held admissible, and sufficient to render the insurers liable.¹ A condition that no claims shall be made unless "satisfactory proof be furnished," that the death was caused by outward and visible means, does not require such proof before bringing the action.²

§ 537. **Accident; Form and Completion of Contract.** — From their very nature, such contracts are made with the ordinary despatch of a purchase and sale. A passenger about to take the cars buys his ticket of insurance as he buys his ticket for fare, and oftentimes of the same person. In each case the ticket is evidence of a contract, completed and binding on both parties. And as in other cases a parol contract to insure or to issue a policy is enforceable, the former at law and the latter in equity, so here a promise to make out a policy or to forward the requisite ticket may be enforced by the appropriate remedy, — as where a party on his way to the cars meets the agent of the company, pays for an insurance for one day, and without waiting for his policy or ticket, which the agent promises to send him, proceeds to the cars, and thence on his journey without having received either. The contract is, nevertheless, complete and valid.³

§ 538. **Accidents to Carriages.** — In France there has been for many years an insurance company, L'Automedon, which takes risks on carriages, indemnifying their owners against civil liability and loss by reason of the negligence of their drivers. In *L'Automedon c. Isot*,⁴ it appeared that one of the defendant's drivers had wilfully driven against and upset another carriage, whereby the owner was thrown out and injured. The injured party sued the defendant and recovered damages, for the reimbursement of which Isot, the defendant, brought suit against the insurers. The main ground of defence was, that as it would be against public policy to insure against the

¹ 8 Wall. (U. S.) 397, Clifford and Nelson, JJ., dissenting.

² *Railway Pass. Ass. Co. v. Burwell*, 44 Ind. 460.

³ *Rhodes v. Railway Passengers' Ass. Co.*, 5 Lans. (N. Y.) 71.

⁴ Dalloz, *Jur. du Royaume*, 1844, pt. 2, p. 128.

consequences of an act which amounts to a crime, such an accident could not be considered as within the scope of the policy ; and such was the view taken by the departmental court ; but on appeal to the Court of Cassation it was held that such accidents, whether *delicta* or *quasi delicta*, were properly subjects-matter of insurance. The temptation to perpetrate a public wrong, said the court, is counteracted by the fact that nothing can be recovered by the insured beyond the damages which he is compelled to pay.

§ 539. **Accident ; Notice of Injury ; Satisfactory Proof.** — Where the policy stipulates that immediately upon the happening of the accident which may result in death a surgeon shall be called, and notice of the accident shall be given within a limited time, a failure to do either will not affect the right to recover, unless it amounts to negligence ; as where a laborer receives a fall, the serious nature of the consequences of which is not at first revealed, and which is of such an apparently trivial character as not then to interrupt his work.¹

¹ *Décheance et aut. c. Comp. d'Ass. La. Sécurité Générale*, Dalloz, Jur. du Royaume, 1870, pt. 3, p. 63 ; *ante*, §§ 296, 465, 536.

CHAPTER XXX.

OF GUARANTEE AND OTHER KINDRED INSURANCES.

ANALYSIS.

- § 540. Guarantee insurance against carelessness, dishonesty, &c., is a contract of suretyship, and the insurers will be subrogated to the rights of the insured against the person in fault. Services of insured to this end. Warranties, Representations, Form. Only a percentage of loss paid.
- § 541. Advantages of such insurance. Its union with life insurance.
- § 541 a. Diligence of clerk. Condition that employer shall prosecute.
- § 542. Statement in application that clerk's accounts would be examined by finance committee every fortnight not a guarantee, see § 543.
- § 543. Misrepresentation as to the amount of money to be in employee's hands fatal. Representation of a third person not a warranty.
- § 544. Insurance against loss in trade by bankruptcy of purchasers.
- § 545. " of the prompt payment of a note.
- § 546. " against the birth of issue.
- § 547. " of rents, titles, and lives of cattle, and insurance against theft, § 547.
- " against hail, §§ 547, 547 a.
- § 547 B. " due at marriage.

§ 540. **Guarantee Insurance.** — What is termed guarantee insurance, which seems to be merely a mode of compensated suretyship, has not, as a distinct business of incorporated companies, had much vogue in this country, although companies have been incorporated with a view to the acceptance of such risks. Nor, indeed, in England, where efforts have been made to establish it as a branch of insurance business, has it made much progress. And there it has been made applicable, for the most part, to the indemnification of parties against the risk from wilful and culpable negligence, infidelity, fraud, and all forms of dishonesty. Strictly speaking, the term "guarantee insurance" is tautological, insurance itself having for its purpose, as we have seen,¹ to guarantee against all forms of loss or pecuniary injury. Of the principles which

¹ *Ante*, § 2.

underlie the contract of suretyship generally, we do not propose to speak. But as special forms of suretyship have been undertaken, under the general title of insurance, we shall state such points in the history and development of these special forms as have come under the cognizance of the courts. The statements made in the application or proposal may be *warranties* or *representations*, as in other kinds of insurance, and, unless specially controlled by the terms of the contract, are subject to the same construction, and have the like force and effect; though, in a mere contract of guaranty, the *concealment* or non-communication of material facts, unless fraudulent, is no defence to an action upon the contract of guaranty.² And where the contract is substantially one of suretyship, the insurers will doubtless, after payment of loss, in accordance with the rule which obtains under the relation of suretyship, be *subrogated* to all the rights of the insured against the party in default, and entitled to all the securities which he may hold against him.³ The *form* of the contract is a policy describing the subject-matter of the risk, setting forth the consideration, and pledging the funds of the company to pay in case the event insured against happens, subject to the conditions of the contract. It is in these special conditions that the policy differs from an ordinary bond of indemnity with sureties, given by a clerk, servant, or agent to secure his employers. These conditions refer, as in other kinds of insurance, to the various circumstances which attend the contract, as the payment of the premiums originally and in case of renewal, the truth of the statements in the proposal or application, the limitation of the risk assumed by the insurer, the notice of loss, mode of proof, times of payment, mode of adjustment, limitation of suit, &c., according to the special views and expe-

¹ The cases upon this subject seem to have been carefully collected by Bunyon, *Life Insurance*, p. 98 *et seq.*, and are reproduced in this country by Bliss, in the chapter on Guarantee Insurance, contained in his valuable work on *Life Insurance*, p. 722 *et seq.*, to which the reader interested in the matter is referred.

² *North Brit Ins. Co. v. Lloyd*, 10 Exch. 523.

³ *Mountague v. Tidcombe*, 2 Vern. (Eng.) 518.

riences of the insurers, and with such modifications as the peculiarity of the risk assumed demands. And the proposal contains such inquiries and answers as are calculated to enable the insurers to determine the value of the risk. — As in marine and fire insurance, the interest of the insured in the preservation of the property is secured by limiting the indemnification to a portion of the property lost, so in guarantee insurance the interest of the insured in preventing the occurrence of the event insured against is secured by providing that in case of loss *only a percentage of the loss* will be paid.¹ And a not unusual provision, peculiar to this form of insurance, is the requirement that in case of loss the insurers shall be entitled to the services of the insured, in whatever form they may be made available, in bringing the delinquent to justice.

§ 541. **Guarantee Insurance.** — The advantages of public or incorporated guarantee insurance over private suretyship are held out to be that it affords to the exertions of all classes increased facilities for obtaining occupations of responsibility and trust ; that it encourages good character, by causing that alone to be the basis of suretyship, apart from the influence of family connections, private interest, or pecuniary resources ; that it relieves private individuals from the necessity of becoming sureties, and from the consequent liability to which they or their estates may be exposed ; and that it offers the best security to employers, because free from the uncertainty and anxiety which unavoidably attach to private suretyship, by reason of unknown death, insolvency, and the many casualties to which such sureties are liable. The union of guarantee with life insurance has also been attempted, upon the principle that two risks rendered dependent on each other can be insured at a lower rate than the same two risks separately. The life insurance becomes, as it were, a contingent collateral security against the risk undertaken for the guarantee, inasmuch as, if a claim be substantiated by the employer under the guarantee policy, the life policy is forfeited. While such a system appears to be equitable, it is also effective in the protection of

¹ Solvency Mut. Guar. Co. v. York, 3 H. & N. 588.

employers, since the self-interest of the employed is involved in any act of delinquency. It is understood that the public authorities in England have to a considerable extent resorted to this form of guaranty in lieu of private bondsmen.¹

§ 541 *a*. **Guarantee Insurance ; Fidelity of Clerk ; Condition that Employer shall prosecute ; Hiring of Servant.** — On a guarantee policy of a clerk's faithful and diligent performance of his duty, who left a large sum of money in open bags in his room while he went to lunch, which money disappeared while he was gone, it was held that the insurers were liable.²

In *Fearnley v. London Guarantee Society*,³ where the policy insuring against embezzlement required the employer to use all due diligence in prosecuting to conviction the employee as a condition precedent to the right to recover, it was held, by an equally divided court, that the fact that a criminal prosecution would subject the employer to an action for damages did not excuse him. The condition precedent was still a valid one.

The allowance of over-drafts without security, in collusion with the parties overdrawing, is a loss "by the want of integrity, honesty, and fidelity, or by the negligence, default, or irregularities of the manager" of a bank.⁴

§ 542. **Guarantee Insurance ; Representation.** — In *Benham v. United Guarantee and Life Insurance Company*,⁵ the defendants granted to the plaintiff, the treasurer of a literary institution, a policy of guarantee against loss occasioned by the want of "integrity, honesty, or fidelity" of the secretary of such institution, "arising out of his employment as such secretary." The policy set forth that, as the basis for the contract of such guarantee, the plaintiff had lodged at the office of the defendants a certain statement containing a declaration, signed by the plaintiff, of the truth of the answers

¹ Bunyon, *Life Insurance*, p. 119.

² *Re Citizens' Ins. Co. &c.*, Q. B. (Quebec), 16 Can. L. J. 334 (Dec. 1880).

³ Sup. Ct. of Judicature (Ireland), 9 Ins. L. J. 160.

⁴ *Bank of Toronto v. European Ins. Co.*, 14 L. C. Jur. 186, Superior Court in review (1870). Appealed to Jud. Com. of P. C.

⁵ 7 Exch. 744.

thereby given to the questions therein contained. This statement contained, amongst others, the following questions and answers : " First, Is the applicant at present in your employment, and if so in what capacity, and has he hitherto performed the duties of the situation faithfully, and to your satisfaction ? — He is secretary. . . . Secondly, Is the applicant personally known to you, or any of your firm, or by whom has he been introduced or recommended to you ? — Only as above. Thirdly, In what capacity do you intend to employ the applicant ? and with reference to this question state, as far as circumstances will permit : (a) The nature of his intended duties and responsibilities. — He is secretary of the Marylebone Literary Institution, of which I am treasurer. (b) The checks which will be used to secure accuracy in his accounts, and when and how often they will be balanced and closed. — Examined by finance committee every fortnight. (c) The salary or emolument, and when it will be paid to him, and how. — Thirty pounds a year at present." Upon these facts it was held that the statement that the accounts would be examined by the finance committee every fortnight did not amount to a warranty, but was a mere representation of the intention of the plaintiff ; and that the insured might, therefore, recover for a loss arising from a want of integrity of the secretary, although such loss was occasioned by neglect to examine the accounts in the manner stated. The application in this case was by the secretary, and the questions proposed were to his employer. The proposal contained a declaration of the truth of the statement therein contained, and that it constituted the basis of the contract. All of the judges agreed that the answer as to the examination of accounts was nothing more than a declaration of the course intended to be pursued, and, if *bona fide*, was not otherwise to be objected to. Martin, B., also adverted to the fact that the questions were put to the employer as of some significance.

§ 543. **Guarantee Insurance ; Misrepresentation.** — The National Guardian Life Insurance Society, as a branch of their business, issued policies called guarantee policies, having for their object the insurance of employers against loss by reason

of the want of honesty or fidelity, or on account of the wilful or culpable default or negligence of their employees. Upon one of these policies, insuring the honesty of a collector of taxes, defence was made on the ground of misrepresentation; and it appeared that prior to issuing the policy certain questions were put to the insured and to his employers, and amongst others inquiry was made as to the largest amount of money which would come into his hands at any one time and be retained by him, and what checks were used to secure accuracy in his accounts. It was replied that he was to collect and account for the sums collected by him; that the amount of money which he was to receive and retain in his hands, not longer than a week, was from one hundred to two hundred pounds sterling; that his accounts would be checked weekly by the surveyor of taxes; that the balance each week would be paid over; and that such balances would be occasionally tested by his employers. It also appeared that his annual collections amounted to nine thousand pounds sterling, and he arrived at his answer by dividing that sum by fifty-two, the number of weeks in the year, whereas in point of fact in some weeks nothing was collected, and in other weeks as high as one-quarter part of the whole sum of nine thousand pounds was collected. And it also appeared that this want of uniformity in the weekly collection was well known to the insured, who was familiar with the course of business. And this sum, in the ordinary course of business, came into his possession during the first week of his service. The insurance was for the benefit of, and payable in case of loss to, the employer, and the employee became a defaulter. *Stuart, V. C.*,¹ seems to have entirely disregarded the misrepresentation as to the largest amount of money to be had in hand at any one time, but to have given judgment for the plaintiff on the ground that the answer about the check had upon the employer was made by the overseer of taxes, a servant of the commissioners, to the latter of whom the inquiry was addressed, and as the

¹ *Towle v. National Guardian Life Ins. Co.*, 7 Jur. N. S. 618. In this report may be found the form of the policy, with the accompanying conditions, which this society adopted.

insurers accepted this answer, it could not be fairly considered a warranty by the commissioners, but was rather the representation of a third person of what was intended. On appeal however,¹ before Lords Justices Knight Bruce and Turner, while the latter seemed to agree with the Vice-Chancellor on the point upon which he made the case to turn, both the learned judges held the statement about the amount of money received a misrepresentation, and as by the terms of the policy it was made void by misrepresentation, gave judgment for the defendant.

§ 543 *a. Representation.* — A representation that the person whose fidelity, &c., is insured “has never been in arrears or default in his accounts,” covers arrears and defaults prior to the time when he entered the service of the person insured.²

So a promissory representation that a town treasurer’s accounts shall be from time to time audited, and that money shall only be drawn in a certain way, must be substantially complied with, or no recovery can be had.³

§ 544. *Insurance against Loss in Trade by Bankruptcy of Purchasers.* — In *Solvency Mutual Guarantee Company v. Froane*,⁴ the insurance was against loss on the gross annual returns of their business for two years, by the bankruptcy of purchasers of goods, and unless two months’ notice, prior to the expiration of the original contract, be given by one of the parties of an intention not to renew, the contract was to be regarded as a renewed contract of the like nature and conditions. This was held to be an agreement for a single renewal, if there was no notice to the contrary; but beyond this single renewal the contract did not extend. And to the same effect was the case of the same company against *York*.⁵ And in *Towle v. National Guardian Insurance Company*,⁶ Sir G. J. Turner, L. J., was of the opinion that a policy had lapsed where the policy provided that it should be good for a year,

¹ *Towle v. National Guardian Life Ins. Co.*, 7 Jur. N. S. 1109.

² *Ottawa Agr. Ins. Co. v. Canada Guarantee Ins. Co.*, 30 U. C. (C. P.) 360.

³ *Board of Education v. Citizens’ Ins. Co.*, 30 U. C. (C. P.) 132.

⁴ 7 H. & N. 5.

⁵ 3 H. & N. 588.

⁶ 7 Jur. N. S. 1109.

“and for every subsequent year that the society shall agree to renew, and the insured to pay” a specified sum, and the society had given no notice nor taken any action whatever touching the subsequent year. In the case of the same company *v. Freeman*,¹ the insurance was of a firm against loss in respect of their gross annual returns, subject to the following condition: “If a member of the company shall die, or if any member, guaranteed with respect to his gross or particular trade debts, shall cease to be such a trader, his guarantee or contract shall become void on such death, or (if such trader) on his retiring from such trade;” and it was held that the retirement of one of two partners in trade was an event by which the condition was violated, and the guarantee became void. And here, as in other forms of insurance, if a party has taken out a policy which is not in accordance with the terms of the agreement, the court will reform the policy, upon a proper bill, so as to make it conform to the original agreement, but will not allow the non-conformity to be pleaded in bar to an action.²

§ 545. **Insurance of the Prompt Payment of a Promissory Note.**—In the Supreme Court of Maryland,³ a case arose upon a policy of insurance upon a promissory note, guaranteeing its prompt payment at maturity. By the statute, the insurance company was authorized to make insurances “against all loss or damage from any cause, hazard, or liability whatsoever on and relating to factories, &c., *choses in action*, and personal property of every description.” The form of this policy was an agreement under seal, in consideration of the premium paid and securities deposited, to guarantee to the bearer the payment of the amount of the note on the day it should fall due, on presentation of the policy at the office of the company. It was held, upon the peculiar facts of the case, that the policy was valid and was negotiable, and therefore available in the hands of a third person. It appears that the note was surrendered to the insurance company at the time the

¹ 7 H. & N. 17.

² *Solvency Ins. Co. v. Freeman*, 7 H. & N. 17. See *post*, § 566 *et seq.*

³ *Ellicott v. United States Ins. Co.*, 8 Gill & Johns. (Md.) 166.

policy was taken out. The form of the contract was declared to be immaterial. The purpose of the obligors being to protect the holder of the notes against the hazard of loss, any form of words effecting that purpose the law will adopt and enforce.

§ 546. **Insurance against the Birth of Issue.** — Insurance against the birth of issue has also been practised to some extent in England. But it has not, so far as we are aware, been introduced into this country; and indeed in England but few companies have the authority to embark therein. "The risk," says Bunyon,¹ "may be either coupled or not with some contingency dependent upon the duration of human life, such as the attainment of a particular age by the issue. The more common case is that in which a tenant for life, under a settlement, is entitled to the reversion in fee-simple, subject to an estate tail in" his own issue (if any) by the particular marriage, and is desirous of mortgaging the estate without burdening his life-interest with the premiums on insurances of his life. . . . The chances of having issue, as depending upon age, health, and other circumstances of more or less importance, are the elements upon which the value of the risk is based.²

§ 547. **Insurance of Rents, Titles, against Theft, Hailstones, and upon the Lives of Cattle.** — Other forms of guarantee insurance are, insurance of rents, which has for its object the prompt payment of rent to landlords or others interested in the profits outcoming from real estate, or to insure to them a regular income by undertaking the management of the property, — to the mortgagee his interest, and to the mortgagor his surplus rent; insurance of what are termed *holding* titles to real property, or interests thereon, in contradistinction to *marketable* titles, whereby the former are rendered salable, and property otherwise immovable for lack of a good legal title becomes marketable; insurance against theft, which needs no explanation; insurance against the ravages of hailstones; cattle insurance, or insurance against the loss of cattle by

¹ Life Insurance, 98.

² See Bunyon, *ubi supra*, for some speculations and discussions bearing upon this point.

disease,—all of which have been practised to some extent in England, and the last two especially to a very considerable extent on the continent, particularly in Germany, France, and Switzerland. But no adjudications by the courts of England of contested points arising under these several forms, have yet, so far as we are aware, been published, though on the continent, especially in France, there has been considerable litigation. These are not, however, deemed of such present interest in this country as to warrant their introduction here. In this country the lives of horses are insured to some extent. In *Hartford Live Stock Insurance Company v. Mathews*, a question arose as to the truth of the representation that the horse whose life was insured was sound, and of a certain value, when in fact he was not sound, and was of much less value. The insurers had paid the loss, and successfully sued to recover back the money paid, as obtained through deceit and false swearing as to value at the time of the loss.¹ In *American Horse Insurance Company v. Patterson*,² which was also an insurance upon the life of a horse, the only question in dispute was whether the horse was alive when the policy took effect.

§ 547 *a*. **Guarantee Insurance ; Hail.** — Where the policy insuring against damage by hail provided that the damage should be determined by appraisers appointed by the company, and in case the appraisement was less than a twenty-fifth of the value no claim should be made on the company, — the insured to bear the expense of the appraisement, — and also that on demand of the agent the costs of the assessment should be deposited by the insured before the assessment is accomplished, it was held that the deposit might be demanded before making the appraisement, without regard to the amount of the damage which might prove to be actually done, and no recovery could be had if the demand for such deposit had not been complied with, and that the loss amounting to one twenty-fifth, and other conditions not preventing, a recovery could be had.³

¹ *Ante*, § 477.

² *Ante*, § 44.

³ *Mutual Hail Ins. Co. v. Wilde*, 8 Neb. 427.

[§ 547 B. **Marriage Insurance.** — A contract of marriage insurance which agrees to pay more on the event of marriage in proportion to the term of membership before marriage is void as having a tendency to induce the indefinite postponement of marriage.¹]

¹ [White v. Equitable Mut. Ben. Union, 76 Ala. 251.]

CHAPTER XXXI.

OF MUTUAL INSURANCE.

ANALYSIS.

- § 548. Each person insured becomes a stockholder, and is at once insured and insurer.
The whole premium may be paid in advance, and no after liability attach.
Charter lien.
- § 549. The capital consists of cash, premium and deposit notes, §§ 549 *a*, 549 *b*.
and the liability of members to a fixed amount beyond these.
- § 550. Mutual and stock business done by same company.
- § 550 *a*. Benevolent associations treated as life insurance companies.
- § 551. Mutual life insurance guarantee fund.
- § 552. Membership. How far members bound by the by-laws. Applicants not bound by them until the contract is complete, and *contra*.
Acts of officers. Safety fund. Diversion of funds from purpose of charter.
False representations in procuring membership. Estoppel to deny membership. A minor may be a member.
- §§ 553, 554. Forfeiture of policy as a defence on note.
- § 555. Surrender and cancellation of policy. See also § 556. Insolvency of maker of premium note.
- § 557. Assessments.
Right to assess strictly construed. The assessment must conform to the charter, and the agreement must be by the proper officers.
Slight errors do not invalidate assessments.
- § 558. What they may include. Insolvency. Set-off.
How the amount for which the assessment is to be made is estimated, and must not be larger than necessary to meet existing charges, or intentionally omit stockholders. But an assessment may be made to cover losses by bad investments, or prior assessment illegal in form, and mere excessiveness if not gross will not be fatal.
- § 560. Classification of risks and funds.
- § 560 *A*. Extent of liability to pay. See also § 561.
Fraud inducing member to join is a defence, § 560 *A*.
But neglect to read the policy, which turns out to be different from what the insured wanted, is no defence. The holder is presumed to know the contents of the policy he accepts.

Assessments, *continued*.

- § 560 B. Forfeiture or suspension by non-payment. (Liability in spite of ; see § 560 A.)
 Not if assessment is invalid;
 or assured's share of company profits will satisfy the assessment on him;
 or the policy is revived, or there is an excuse for non-payment which the company ought to recognize.
 Evidence of forfeiture. Company's books the best.
- § 561. Sometimes the whole amount of the deposit note becomes due upon a single default.
- § 561 A. Waiver.
 by course of dealing.
 any subsequent recognition of policy as valid.
 sending a second notice after the expiration of the time for payment.
 subsequent levy or collection of an assessment, unless qualified.
- § 562. Notice of assessment. Mail. By-law.
 Charter provision. Publication. Date.
 Time allowed for payment after.
- § 563. Contract with parties out of the State.
 Lien. See also § 560 A.
- § 563 A. It is the duty of the company to make an assessment within a reasonable time, and pay a loss, and if it does not, suit may be brought, either for *mandamus* to compel an assessment, or for the amount of an assessment levied, or, where none has been levied, for the maximum amount of the policy, leaving the company to prove if it can that a proper assessment would not produce so much. This is the best doctrine, though there are *contra* authorities both as to the form of suit and the burden of proof.
 A by-law may diminish the class assessable, or may require resort to a superior body of the society before suit, but cannot cut off final resort to the courts.
 Numbering of certificates *prima facie* evidence of membership.
 Lack of certificate fatal to suit.
- § 564. Liability of directors for neglecting to assess.

§ 548. **Mutuality ; Membership ; Capital ; Lien.** — We have already had occasion to refer to some of the distinctions between mutual and stock insurance, especially with reference to their respective powers to enter into contracts, and to waive the provisions of their charters and by-laws.¹ Some further peculiarities of mutual insurance will be made the subject of this chapter. The principle which lies at the foundation of mutual insurance, and gives it its name, is mutuality ; in other words, the intervention of each person

¹ See *ante*, §§ 62, 146 *et seq.*

insured in the management of the affairs of the company, and the participation of each member in the profits and losses of the business, in proportion to his interest. Each person insured becomes a member of the body corporate, clothed with the rights and subject to the liabilities of a stockholder.¹ He is at once insurer and insured. In New York companies have been chartered to do business "on the mutual plan," with authority to give the insured an option whether to pay the whole premium in advance in cash, without further liability to assessments, or to pay part in cash and part in an assessable premium note. And it was contended that this option was inconsistent with the principles of mutuality. But the court held otherwise. The money they held to be in lieu of the note, and subject to the same appropriation, with the difference that it must be first applied, and no part of it can be withdrawn at the expiration of the policy, although it may not have been all expended. The principle of mutuality was said to consist not in the fact that each member is an insurer as well as the insured, but in the fact that he contributes to the common fund,—this contribution being sufficient to constitute membership, and may as well be represented by cash as by a note.² And an ordinary note may in such case be accepted as a substitute for the cash payment.³ The fact that there is no further liability on the part of the member, if the possible extent of his liability is met by payment of cash in advance, does not militate against the principle of mutuality.⁴

¹ [A contract by which one party promises to make a payment of indemnity or towards it, upon the loss or destruction of something in which the other has an interest is a contract of insurance, and it makes no difference that the promisor is a corporation and the promisee becomes a member of it, and the sums promised are to be paid by assessments. *State v. Insurance Co.*, 30 Kans. 585.]

² *Mygatt v. N. Y. Prot. Ins. Co.*, 21 N. Y. 52; *Ohio Mut. Ins. Co. v. Marietta Woollen Co.*, 3 Ohio St. n. s. 348. [That a policy is for cash and on short time does not make it a stock policy. *State v. Manufacturers' Mut. Fire Ins. Co.*, 91 Mo. 311.]

³ *Carey v. Nagle*, 2 Abb. (U. S.) 156.

⁴ *Union Ins. Co. v. Hoge*, 21 How. (U. S.) 35. The four cases last cited, and especially the first of them, are referred to as containing a very elaborate discussion of the principles which underlie mutual insurance. But see *contra*, *Hart v. Achilles*, 28 Barb. (N. Y.) 577.

And the premium notes so held are liable for losses under cash policies.¹

The lien given by charter upon property insured is not valid against a *bona fide* purchaser.²

§ 549. **Mutual Insurance ; Capital.** — Although the members of a mutual company are not usually denominated stockholders, and are not stockholders in the usual sense of the word, yet they are in point of fact stockholders, and in many of the policies are recited to have taken a portion of the capital stock. This stock is usually taken by paying in a certain amount of cash premium, and the balance in what are denominated premium notes ; that is, notes given for premiums, to form the basis of assessments for losses and expenses, and constituting the capital or funds of the company. The capital stock of a mutual insurance company usually consists in its cash assets, its premium and deposit notes, assessable to pay losses, which are usually denominated absolute funds, and the liability to a fixed amount, by statute or charter, over and beyond these, to be resorted to after the first are exhausted, and usually denominated conditional funds. Sometimes notes given to the company in advance for premiums, called stock or advance notes, and expressly made payable by insurance from time to time, as the makers of the note may require, constitute a portion of the capital stock. And between these latter notes and the ordinary deposit notes, made payable from time to time, as called for by assessments for losses, the distinction is to be observed that whereas the former are payable absolutely and at all events, without regard to the question of loss,³ and are therefore subject to the Statute of Limitations,⁴ and are negotiable,⁵ the latter are only payable at such times and in such portions as may be necessary to

¹ *White v. Havens*, 20 How. Pr. 177 ; *Ohio Mut. Ins. Co. v. Marietta Woolen Co.*, *supra*.

² *Kentucky v. Insurance Co.*, 7 Bush (Ky.), 23 ; *McCulloch v. Indiana Mut. &c. Ins. Co.*, 8 Blackf. (Ind.) 50.

³ *Dana v. Munro*, 38 Barb. (N. Y.) 528 ; *Brown v. Croke*, 4 Comst. (N. Y.) 51 ; *Maine Mut. Ins. Co. v. Scranton*, 49 Me. 448.

⁴ *Savage v. Medbury*, 19 N. Y. 32.

⁵ *Brookman v. Metcalf*, 32 N. Y. 591.

meet losses and expenses, are not negotiable, because payable only upon a contingency which may never happen, and the general Statute of Limitations does not run in favor of the note as a whole, but only upon so much as may be called for, and from the time of the call.¹ And a premium note, absolute on its face, cannot be treated by the company or its receiver, or by any one except a *bona fide* holder, as a stock or capital note, so that the whole may be collected without regard to losses or assessments.² A note given in advance for premiums to be earned, and by the terms of the charter not to be held liable for any amount beyond the premiums earned, is a premium note, and not a subscription or capital stock note, and is collectible only so far as premiums have been earned.³ Whether a note is a premium or stock note is a question of evidence, with a presumption that it is a stock note if given before the organization of the company.⁴ And a note, in form a premium note, may be shown to have been given as a subscription or stock note, and used as such, with the consent of the maker, in organizing the company; in which case the whole amount may be collected without assessment.⁵

§ 549 *a*. **Mutual Insurance; Absolute Funds.** — In some forms of mutual insurance the charter provides substantially that when a person becomes a member he shall, in addition to the payment of the premium, deposit his note for a like amount, as a part of the capital stock of the company, to be assessed and collected by the directors in such sums and at such times as they shall deem expedient; that all premiums and deposits thus made shall be denominated the absolute funds, to be applied to the payment of expenses, borrowed money, and losses; and if these funds should prove insufficient, then the member is to be liable to be called upon to twice the amount of the premium

¹ *Savage v. Medbury*, *ut supra*; *Howland v. Edmonds*, 24 N. Y. 307, reversing *Bell v. Yates*, 33 Barb. (N. Y.) 627, 628, *contra*; *Hope Ins. Co. v. Weed*, 28 Conn. 51; *Hope, &c. Ins. Co. v. Perkins*, 2 Abb. (N. Y.) App. Cas. 383; *Howland v. Cuykendell*, 40 Barb. (N. Y.) 320; *Sinkler v. Indiana Turnp. Co.*, 3 Pa. 149.

² *Bell v. Shibley*, 33 Barb. (N. Y.) 610; *McIntire v. Preston*, 5 Gilm. (Ill.) 48.

³ *Elwell v. Crocker*, 4 Bosw. (N. Y. Superior Ct.) 22.

⁴ *Jackson v. Van Slyke*, 52 N. Y. 645.

⁵ *Sands v. St. John*, 36 Barb. (N. Y.) 628.

and deposit. In such case the deposit note is collectible at the discretion of the directors, without assessment, and the proceeds may be applied to the payment of losses accrued before the member became insured.¹

§ 549 b. **Mutual Fire Insurance ; Security Notes ; Insolvency.**

— In other forms of mutual insurance the companies are authorized, for the better security of dealers, to receive notes for premiums in advance from persons intending to take out policies, and to negotiate such notes for the purpose of paying claims or otherwise in the course of its business ; and on such portions of said notes as may exceed the amount of premiums paid by the respective makers, and on new notes taken in advance from time to time, annually to allow a compensation of a certain per cent for their use. These are termed security notes, and are in addition to the notes given for premiums in advance in the usual course of business, and to be resorted to only in case of the insufficiency of the latter to meet the claims against the company. Under such a proviso the notes are negotiable by the president without a vote of the directors, under his general authority to transact the business of the company, and may be transferred to a member of the company in payment of a claim for loss,² or for other purposes, even before a loss or before any insurance has been effected.³ And a transfer by act of law without indorsement is effectual ;⁴ but a promise by the president before its maturity, or at that time, to give such a note up, is one which he has no authority to make.⁵ Nor is a surrender by the directors without consideration, binding upon the receiver.⁶ And neither the insolvency of the company, nor the fact that the note is overdue, is a defence, if from an insufficiency of other funds it becomes necessary to resort to this further security. Whether negotiated before or after maturity, they are recoverable to their full amount, less the premiums on policies taken out by the

¹ *Nashua Fire Ins. Co. v. Moore*, 55 N. H. 48.

² *Aspinwall v. Meyer*, 2 Sandf. (N. Y. Superior Ct.) 180.

³ *Brouwer v. Appleby*, 1 Sandf. (N. Y. Superior Ct.) 158.

⁴ *Brouwer v. Hill*, 1 Sandf. (N. Y. Superior Ct.) 629.

⁵ *Ibid.*

⁶ *Ibid.*

makers, and the interest due at the time of insolvency by the company.¹ All renewal notes, given for any outstanding balance of the original note, stand upon the same footing, and are payable notwithstanding the company after failure refuse an application for insurance.² But if the renewal note be for the same amount as the original note, without deduction of premiums, which may have been debited during its currency, these cannot afterwards be deducted in a suit by the receiver to collect the note. The renewal of the note to the full amount is to be regarded as an election to have the benefit of the continued subscription to that amount, with the advantage of the five per cent compensation, and the extended credit for premiums which they might incur.³ If these notes are taken subsequent to the organization of the company, it is a question of fact whether they are given for premiums in advance in the usual course of business, or as security notes.⁴

§ 550. **Mutual and Stock Companies.** — In some instances the stock and mutual plans of insurance are authorized by the charter and practised by the same insurance company. When this is the case, the insured, in the absence of any statement in the contract in which category he is included, will be deemed to be insured under the stock or mutual plan, according to the circumstances or nature of the particular contract.⁵ The premium notes in such case represent the capital stock, and may be resorted to by all the cash policy-holders for their indemnity.⁶

§ 550 *a*. **Benevolent Associations.** — There are certain organizations prevalent in this country and elsewhere, under the name of relief, benefit, or benevolent societies, or some simi-

¹ *Hone v. Allen*, 1 Sandf. (N. Y. Superior Ct.) 171, n.; *Merchants' Mut. Ins. Co. v. Leeds*, id. 183; *Deraismes v. Merchants' Mut. Ins. Co.*, 1 Comst. (N. Y.) 371.

² *Hone v. Folger*, 1 Sandf. (N. Y. Superior Ct.) 177.

³ *Hone v. Ballin*, 1 Sandf. (N. Y. Superior Ct.) 181.

⁴ *Merchants' Mut. Ins. Co. v. Rey*, 1 Sandf. (N. Y. Superior Ct.) 184; *Brouwer v. Hill*, 1 Sandf. (N. Y. Superior Ct.) 629.

⁵ *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354.

⁶ *Hays v. Lycoming, &c. Ins. Co.*, 98 Pa. St. 184; 10 Ins. L. J. 507; *Schimpf v. Lehigh, &c. Ins. Co.*, 86 Pa. St. 373.

lar name, which generally have for their object aid to their members, or to their widows and children after the decease of their respective members, and in some cases having both objects. These associations, though not speculative, and not based upon capital paid in as an investment, have nevertheless a general purpose of mutual protection, resorting to assessments for the procurement of the funds to discharge the mutual obligations of members, and are governed by by-laws which limit and define these obligations. Their certificates of membership often resemble, both in form and substance, ordinary policies of life insurance; and the courts have with great uniformity treated them as substantially life insurance companies, applying to them, and to the virtual relatives of the members, the rules and principles applicable to the contract of life insurance.¹

§ 551. **Mutual Life Insurance; Guarantee Fund.** — Under its inherent powers, as incidental to its general power to issue policies of insurance, a mutual life insurance company may, by an agreement amongst its members, establish a guarantee fund, consisting of the notes of the several members, upon which they may receive a commission of a percentage per annum, so long as the notes are held as a part of such fund. And in case of insolvency of the company, these notes may be assessed to pay losses to their full amount, the makers stand-

¹ *Commonwealth v. Wetherbee*, 105 Mass. 149; *Kentucky Masonic Ins. Co. v. Miller*, 13 Bush (Ky.), 489; *Shunck v. Gegenseitiger, &c. Fund*, 44 Wis. 370; *Dietrich v. Madison Relief Ass.*, 45 id. 79; *Masons' Benevolent Soc. v. Winthrop*, 85 Ill. 537; *State v. Merchants' Exch. Benev. Soc. (Mo.)*, 10 Ins. L. J. 59; *Swift v. Railway, &c. Conductors' Mut. Aid, &c. Ass. (Ill.)*, id. 53; *Ancient Order of Mutual Workmen v. Moore (Ky.)*, 9 id. 539; *Protection Life Ins. Co., In re, C. Ct. (Ill.)*, id. 145. In this case the policies issued by the company provided that payment of death-losses should be made by assessment *pro rata* upon the policy-holders, and further provided the manner of making such assessment by the company, and that the assessment was to be made upon those holding policies at the time of the assessment; and it was held that an assessment under these policies does not make the policy-holders debtors to the company so as to authorize it to bring suit in case of neglect or refusal to pay, nor can the assignee in bankruptcy of such company maintain such suit. The amount to be assessed is not an asset of the company, and, when collected, does not belong to the company or its general creditors, but to the special class of creditors, the beneficiaries, who could alone maintain this suit.

ing in the position of general creditors as to their claims for commission against the company.¹ If such a right be given by charter, the notes of persons not members cannot be substituted under this chartered privilege.²

§ 552. **Mutual Insurance ; Membership.** — By the insured in a mutual insurance policy is meant the person who owns the property, applies for the insurance, pays the premium, and signs the deposit note, and not another person to whom the money may be made payable in case of loss.³ When a party takes out a policy, and the contract is complete, he becomes a member, and is bound by its rules and the provisions of the charter, which he is presumed to know.⁴ The records of the

¹ *Hope Mut. Life Ins. Co. v. Weed*, 28 Conn. 51; *Hope Mut. Life Ins. Co. v. Perkins*, 38 N. Y. 404, affirming s. c. 4 Robt. 18.

² *Mut. Ben. Life Ins. Co. v. Davis*, 12 N. Y. (2 Ker.) 569.

³ *Sanford v. Mechanics' Mut. Fire Ins. Co.*, 12 Cush. (Mass.) 541.

⁴ *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. St. 402; *Coles v. Iowa State Mut. Ins. Co.*, 18 Iowa, 426. Until the contract is complete, a mutual company has no other or better position with reference to the insured than a stock company. *Eilenberger v. Protection Ins. Co.*, 89 Pa. 464. One previously insured in a mutual company is, however, presumed to know its by-laws and business routine. *Fuller v. Madison, &c. Ins. Co.*, 36 Wis. 599. As to business routine, *contra*, *Walsh v. Aetna Life Ins. Co.*, 30 Iowa, 133. [The by-laws of the company are part of the contract, and all members must take notice of them. *Supreme Lodge, K. of P. v. Knight*, 117 Ind. 489; *Splawn v. Chew*, 60 Tex. 532; *Treadway v. Hamilton Mut. Ins. Co.*, 29 Conn. 68 at 69; *Simeral v. Dubuque Mut. Fire Ins. Co.*, 18 Iowa, 319 at 322 (at least where the policy refers to them). Sometimes a by-law provides that any policy issued on property mortgaged to one-half its value shall be void, and that mortgaged property shall not be insured so that the insurance and mortgage together shall exceed three-fourths of its value. In such case the company is not bound to ascertain the value of the property, the assured is bound to know the by-law and the value, and takes the risk on himself when he signs the application. Such action amounts to a warranty that the by-law is not violated. *Van Buren v. St. Joseph Co. Village Fire Ins. Co.*, 28 Mich. 398. It was held in New Jersey that a member of a mutual company is presumed to know the by-laws, and a representation by the treasurer that they were all in the policy under the head of "conditions of insurance" does not estop the company from setting up a by-law not in the policy. *Miller v. Hillsborough Mut. Fire Ins. Co.*, 42 N. J. Eq. 459. But on appeal the court decided that although the constitution and by-laws were made a part of the policy by words in the body of it, yet the annexation to the policy of a number of by-laws called "conditions of insurance" justified the inference that no other by-law could affect the policy, and as there was no actual knowledge of the by-law relied on by the company, the decree was reversed. 44 N. J. Eq. 224,

company are then his records, and evidence for or against him;¹ and the doings of the officers within the scope of their authority are binding upon him.² But he is not a member till the negotiations are complete, and is not presumed to know anything of the rules and by-laws pending the negotiations.³ After he becomes a member he cannot deny its existence, or avail himself collaterally of an irregularity in the proceedings by which it became a corporation, or acquired its powers;⁴ nor can he deny collaterally the acceptance of an amendment to the charter, after he has given a note in accordance with the provisions of such amendment;⁵ nor can he set up a want of insurable interest as a defence against assessments,⁶ as under the principle of mutuality these deposit notes upon which assessments are made constitute a fund which he has no right to withdraw, it having been established for the benefit of others as well as of himself. He is not, however, bound by a by-law or other act of the company affecting his contract or relation to the company, passed without his consent,⁷

227. A mutual company cannot by a subsequent by-law affect the rights of a member: *Northwestern Ben. & Mut. Aid Ass. v. Wanner*, 24 Brad. 361; unless of course there were an express agreement that subsequent by-laws should enter the contract.]

¹ *Diehl v. Adams County Mut. Ins. Co.*, 58 Pa. St. 443.

² *Hackney v. Alleghany County Mut. Ins. Co.*, 4 Pa. St. 185. [If, however, an officer violates his duty, as by wilfully refusing to make the required certificate that a member is sick, the latter may bring suit. *Order of the Iron Hall v. Stein*, 19 Ins. L. J. 20 (Ind.) 1889.]

³ *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331. And see also *Cumberland County Mut. Prot. Co. v. Schell*, 29 Pa. St. 31. These cases must be considered as rejecting the contrary doctrine asserted by *Gibson, C. J.*, in *Susquehanna Ins. Co. v. Perrine*, 7 W. & S. (Pa.) 348.

⁴ *Sands v. Hill*, 42 Barb. (N. Y.) 651; *Traders' Mut. Fire Ins. Co. v. Stone*, 9 Allen (Mass.), 483; *Appleton Mut. Ins. Co. v. Jesser*, 5 id. 446; *Citizens' Mut. Ins. Co. v. Sortwell*, 8 id. 217; *Currie v. Mut. Ass. Soc.*, 4 H. & M. (Va.) 315; *Cooper v. Shaver*, 41 Barb. (N. Y.) 151; *Nashua Fire Ins. Co. v. Moore*, 55 N. H. 48; *Prov. Fire & Mar. Ins. Co. v. Murphy*, 8 R. I. 171; *Brouwer v. Appleby*, 1 Sandf. (N. Y.) 158; *Judale v. American Ins. Co.*, 4 Ind. 333; *Yard v. Pacific, &c. Ins. Co.*, 2 Stockt. (N. J. Ch.) 480.

⁵ *Fell v. McHenry*, 42 Pa. St. 41; *Hope Mut., &c. Ins. Co. v. Beckmann*, 47 Mo. 93.

⁶ *New England Mut. Fire Ins. Co. v. Belknap*, 9 Cush. (Mass.) 140. See also *post*, § 590.

⁷ *New England Mut. Fire Ins. Co. v. Butler*, 34 Me. 451; *Hamilton Mut. Ins.*

especially if in contravention of the charter.¹ And if he be induced to become a member by fraudulent representations of the insurers or their agents, the fraud vitiates the contract, and relieves the insured from any obligations towards the insurer under it.² [A member of a society organized for the benefit of wives, orphans, heirs, and devisees of deceased members cannot derive profit from the society, and an agreement to pay a member a certain sum at seventy years of age is void.³ It is the duty of a mutual society to protect the members and the funds in its hands from all invalid claims, and it is error to exclude evidence of false representations in procuring membership.⁴ Where the safety fund is by the terms of the contract to be applied for the benefit of members of five years' standing, claimants for death losses have as such no rights in the fund.⁵ A company which after knowledge of a breach continues to make calls, and votes to reinstate the member, though not in all respects proceeding in conformity with the rules of the institution, is nevertheless estopped from denying that the deceased was a member in good standing.⁶ A minor may be received as a member of a mutual benefit association. Payment of assessments is not compulsory on any one. If they are paid by the infant he is entitled to the corresponding benefits. If they are not paid, his membership ceases just as in the case of an adult.⁷]

§ 553. **Forfeiture of Policy no Defence against Liability on Note.** — When membership is once established, its liabilities

Co. v. Hobart, 2 Gray (Mass.), 543; *Insurance Co. v. Connor*, 17 Pa. St. 136; *Bradfield v. Union, &c. Ins. Co. (C. C. P. Pa.)*, 10 Ins. L. J. 551; *Wallace v. Insurance Co.*, 4 La. 289; *Rosenberger v. Insurance Co.*, 6 Norris (Pa.), 267; *Van Slyke v. Trempealeau, &c. Ins. Co.*, 48 Wis. 683.

¹ *Great Falls Mut. Fire Ins. Co. v. Harvey*, 45 N. H. 292.

² *Jones v. Dana*, 24 Barb. (N. Y.) 395; *Devendorf v. Beardsley*, 23 id. 656; *Fogg v. Griffin*, 2 Allen (Mass.), 1; *Brown v. Donnell*, 47 Me. 421; *Sterling v. Mer. Mut. Ins. Co.*, 32 Pa. St. 75; *Salmon v. Richardson*, 30 Conn. 360; *ante*, § 133.

³ [*Canton Masonic Mut. Ben. Soc. v. Rockhold*, 26 Brad. 141.]

⁴ [*Mayer v. Equitable Life Ass.*, 42 Hun, 237.]

⁵ [*Burdon v. Mass. Safety Fund Ass.*, 147 Mass. 360, 366.]

⁶ [*Hoffman v. Supr. Council of Amer. Leg. of Honor*, 35 Fed. Rep. 252 (Va.) 1888.]

⁷ [*Chicago Mut. Life Indem. Ass. v. Hunt*, 127 Ill. 257.]

continue, although the member does some act which, by the terms of the contract, avoids the policy, and although the company declares the policy void, so that the right of the insured to indemnity in case of loss no longer exists. And this liability extends to all losses while the policy is in force and the insured is a member,¹ even after a total loss upon the policy by which he becomes a member.²

Acts of policy-holders, which might entitle the corporation to defend against claims for losses, do not necessarily release such parties from liability to assessment as members. They cannot take advantage of want of insurable interest, whether it existed originally, or was occasioned by destruction or removal of the buildings insured, or by alienation; nor of misdescription of the property insured, or its mode of occupation; nor of a loss of the right to recover upon the policy by reason of other insurance not assented to. Such parties are members of the corporation, notwithstanding such ground of defence to a suit for recovery of a loss. They cannot, by their own act, negligence, or fraud, lay the foundations of their exemption from liability. The assent of the other party to the contract is necessary to the release; or at least some such recognition of the act, negligence, or fraud as amounts to an assertion by the insurers of their election to treat the relationship by contract as at an end.³

But members only are liable to assessment. Parties who have neither taken their policy, nor signed any application or deposit note, nor paid the premium, are not members, and cannot properly be included in the assessment. Assignees of policies, even with consent of the company, who have not made themselves members by signing any agreement to become so, or to pay what may become due upon the policy or upon the deposit note, are not liable to assessment.⁴ And

¹ *Iowa State Mut. Ins. Co. v. Prossee*, 11 Iowa, 115; *Commonwealth v. Union Mut. Fire Ins. Co.*, 112 Mass. 116.

² *Swamscot Machine Co. v. Partridge*, 5 Fost. (N. H.) 369.

³ *Post* § 554; *Boot & Shoe, &c. Ins. Co. v. Melrose*, 117 Mass. 199; *Cumings v. Sawyer*, 117 Mass. 30; *Columbia Ins. Co. v. Buckley*, 83 Pa. 293, 298.

⁴ *Commonwealth v. Union Mut. Ins. Co.*, *ubi supra*; *Philbrook v. New England Mut. Ins. Co.*, 37 Me. 137; *Gardiner v. Piscataquis Mut. Fire Ins. Co.*, 38

where the policy is assigned by consent of the insurers, and the assignee thereby becomes a new member, he is not liable for an outstanding unpaid premium note given by the assignor, unless so stipulated.¹

And if the policy by its terms stipulates that in case of forfeiture by the act of the insured he shall not be released from the obligations of the deposit or premium note until he has complied with the conditions of the policy and charter, requiring the payment of his proportion of all losses and expenses that may have accrued prior to the surrender of the policy or alienation of the property, the insured will still remain liable upon his deposit note for losses occurring after, as well as before, the alienation or act working the forfeiture, until all assessments are paid and the policy surrendered. And this is so notwithstanding the policy provides that the person becoming a member shall continue a member so long as he is insured and no longer.² But an assessment after forfeiture of the policy, made with knowledge thereof, actual or constructive, and for losses occurring afterwards, is a waiver of the forfeiture, and gives to the insured the right to indemnity for loss under the policy.³ It is otherwise, how-

Me. 439; *Boynton v. Clinton Ins. Co.*, 16 Barb. (N. Y.) 254; *New Hampshire, &c. Ins. Co. v. Hunt*, 30 N. H. 219; *Cumings v. Hildreth*, 117 Mass. 309.

¹ *Storms v. Canada Farmers' Mut. Ins. Co.*, 22 U. C. (C. P.) 75.

² *Hyatt v. Wait*, 37 Barb. (N. Y.) 29; *Neely v. Onondaga County Mut. Ins. Co.*, 7 Hill (N. Y.), 49; *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328. But see *contra*, *Wilson v. Trumbull County Mut. Ins. Co.*, 19 Pa. St. 372; *Indiana, &c. Ins. Co. v. Conner*, 5 Port. (Ind.) 170, overruling *Indiana, &c. Ins. Co. v. Coquillard*, 2 Carter (Ind.), 645; *Bersch v. Sinnissippi Ins. Co.*, 28 Ind. 64. But the obvious distinction between mutual and stock insurance seems not to have been duly considered in these cases. In fact, it gives greater rights to one insured in a mutual company than to one insured in a stock company. The latter cannot recover back a premium after forfeiture by a voluntary alienation. Nor can the former. The deposit note is but the premium paid; and if he can avoid his liability thereon, he practically thereby recovers back his premium. But this he has placed at the disposition of others, and he cannot at his own pleasure, and without their consent, withdraw it. He may forfeit his rights, but he cannot avoid his obligations to others without their consent. See *Crawford County Mut. Ins. Co. v. Cochran*, 88 Pa. St. 230, which seems inconsistent with *Wilson's* case.

³ *Sands v. Hill*, 42 Barb. (N. Y.) 651; *Insurance Co. v. Slockbower*, 26 Pa. St. 199; *Tuttle v. Robinson*, 33 N. H. 104; *Viall v. Genesee, &c. Ins. Co.*, 19

ever, if the assessment is made for a loss occurring before the forfeiture, or be made without knowledge of the forfeiture.¹ And an assessment for losses occurring after forfeiture, made by the company with knowledge of the forfeiture, cannot be enforced.²

§ 554. **Forfeiture ; Premium Note.** — A successful defence to an action on the policy for a loss, on the ground that the policy became void because the insured procured other insurance without notice, is in legal effect an adjudication between the parties that the policy was void from and after the day when the additional insurance was procured; and from the moment that the insurers thus elect to avoid the policy, the premium note also becomes void, and without consideration in respect to all future losses.³ A vote, however, to suspend the operation of the policy, without authority of charter or by-law, or the assent of the insured, is of no force or effect.⁴ In Rhode Island, where a mortgagor insured under a policy, void if the interest of the insured should be conveyed without the consent of the insurers, made an assignment of his interest without the knowledge of the insurers or the mortgagee, and afterwards, but without knowledge of the alienation, the insurers made an assessment and collected it from the insured, in an action to recover the loss, with a count for money had and received, it was held that though the plaintiff could not recover for the loss by reason of the alienation, and although the collection of an assessment without knowledge of the forfeiture was no waiver, yet the insured might recover back on his money

Barb. (N. Y.) 440; *ante*, § 505; *Farmers', &c. Ins. Co. v. Bowen*, 40 Mich. 147. But see *contra*, *Philbrook v. New England Mut. Ins. Co.*, 37 Me. 137; *Neely v. Onondago, &c. Ins. Co.*, *supra*.

¹ *Allen v. Vermont Mut. Fire Ins. Co.*, 12 Vt. 366; *Finley v. Lycoming County Mut. Ins. Co.*, 30 Pa. St. 311; *Smith v. Saratoga, &c. Ins. Co.*, 3 Hill (N. Y.), 500, 508; *Lyons v. Globe, &c. Ins. Co.*, 28 U. C. (C. P.) 62.

² *Tuckerman v. Bigler*, 46 Barb. (N. Y.) 375; *Smith v. Saratoga County Mut. Ins. Co.*, 3 Hill (N. Y.), 500; *Wilson v. Trumbull County Mut. Fire Ins. Co.*, 19 Pa. St. 372.

³ *Tuckerman v. Bigler*, 46 Barb. (N. Y.) 375.

⁴ *New England Mut. Fire Ins. Co. v. Butler*, 34 Me. 451.

count what he had paid on the assessment, as money paid by mistake.¹

§ 555. **Void Policy ; Surrender and Cancellation ; Insolvency.** — If the contract of insurance be invalid, as unauthorized by law, or as prohibited unless under certain preliminary conditions precedent, the premium note is also invalid *ab initio*.² So if the policy be delivered but is ineffectual because never countersigned, the premium note is also invalid.³ And it has been held that the surrender and cancellation of the policy and premium note dissolves the membership, carries with it the note, and releases the insured from further claims, whether on account of past or future losses, as amounting to an adjustment of mutual claims.⁴ So the insolvency of the maker of the premium note, and his discharge from his debts, relieves the company from any obligation towards him, and the receipt of interest upon the premium note after the filing of the petition in bankruptcy, without *actual* knowledge, will not revive the policy.⁵ Other authorities hold that in such cases the

¹ Hazard v. Franklin Fire Ins. Co., 7 R. I. 429. In Indiana, it is said, *obiter*, that where a policy becomes void by a sale and conveyance by the insured, he is no longer liable to an assessment upon his premium note : Boland v. Whitman, 33 Ind. 64 ; though in a previous case, Indiana Mut. Ins. Co. v. Conner, 5 Ind. 170, the note was held to be collectible in proportion to the time the policy was in force. And the liability is discharged whether the policy be actually surrendered or not, the insured having paid all assessments and dues up to the time of forfeiture. The insurance is the consideration upon which the note rests, and that failing, the note fails : Ibid. ; overruling McCullough v. Indiana Mut. Fire Ins. Co., 8 Blackf. (Ind.) 50, and Indiana Mut. Fire Ins. Co. v. Coquillard, 2 Ind. 645, holding that an actual surrender of the policy is necessary.

² Haverhill Ins. Co. v. Prescott, 42 N. H. 547 ; Ingrams v. Mut. Ass. Soc., 1 Rob. (Va.) 661.

³ Lynn v. Burgoyne, 13 B. Mon. (Ky.) 400.

⁴ Wadsworth v. Davis, 13 Ohio St. 123 ; Hyde v. Lynde, 4 Comst. (N. Y.) 387 ; Campbell v. Adams, 38 Barb. (N. Y.) 132 ; York County Mut. Fire Ins. Co. v. Turner, 53 Me. 225. It was so held in New York, though the premium note was retained, assessments paid thereon, and the policy reassigned as collateral, — the conveyance of the property, assignment, and reassignment of the policy having been assented to by the insurers. Miner v. Judson, 2 Lans. (N. Y.) 300.

⁵ Reynolds v. Mut. Fire Ins. Co., 34 Md. 280. It was said by Bradley, C. J., in Frost v. Saratoga Mut. Fire Ins. Co., 5 Denio, 154, that if the policy is void for false warranty, the premium note is void for want of consideration. But this was not a point necessary to be decided in the case.

policy is merely voidable and not void, and the premium note is therefore valid, at least till the insurers assert their right to claim a forfeiture.¹ But it is elsewhere held that neither the surrender and cancellation, nor the expiration of the policy, nor the insolvency of the company, releases the holder of a policy from his liability to assessment for losses which occur during his membership.² The true doctrine doubtless is, that if the surrender of the policy and of the premium note are in pursuance of an adjustment which the company has a right to make, there is no longer membership or liability.³ An unexecuted agreement to cancel is no defence.⁴ Neither does the destruction of the property and payment of the loss dissolve the relations of the insured to the company. He is still insured and liable on his deposit note during the currency of the policy; and during that period the company has a lien upon the insured premises.⁵ Upon a vote of the directors, authorized by the by-laws, that by reason of non-payment of an assessment the policy shall be suspended till payment, the liability of the insured to assessments for losses occurring during the suspension continues, though his right to indemnity meantime is in abeyance.⁶ So, without a vote of the directors, if the charter provides that neglect to pay an assessment shall operate as a suspension of the liability.⁷ If a by-law provide that upon alienation the insured may surrender his policy, and receive a sum not exceeding his deposit money,

¹ *Huntley v. Perry*, 38 Barb. (N. Y.) 569, 571; *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328. And see *ante*, § 282. But see *contra*, *Gardiner v. Piscataquis Mut. Fire Ins. Co.*, 38 Me. 439; *Jackson v. Mass. Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418; *Wilson v. Trumbull County Mut. Fire Ins. Co.*, 19 Pa. St. 372; *ante*, § 553.

² *Commonwealth v. Union Mut. Fire Ins. Co.*, 112 Mass. 116; *St. Louis Mut. Fire Ins. Co. v. Boeckler*, 19 Mo. 135; *Sterling v. Mer. Mut. Ins. Co.*, 32 Pa. St. 75; *Alliance Mutual Ins. Co. v. Swift*, 10 Cush. (Mass.) 433; *post*, § 556.

³ *Acker, Receiver, v. Hite* (Pa.), 10 Ins. L. J. 20; *Sands, Receiver, v. Hill*, 55 N. Y. 18; *Columbia Ins. Co. v. Buckley*, 83 Pa. 293; *New Hampshire, &c. Ins. Co. v. Rand*, 24 N. H. 428.

⁴ *Columbia Ins. Co. v. Stone*, 3 Allen (Mass.), 385.

⁵ *Bangs v. Scidmore*, 24 Barb. (N. Y.) 29; affirmed, 21 N. Y. 136; *New Hampshire Mut. Fire Ins. Co. v. Rand*, 4 Fost. (N. H.) 428.

⁶ *Coles v. Iowa State Mut. Ins. Co.*, 18 Iowa, 425; *Blanchard v. Atlantic Mut. Fire Ins. Co.*, 83 N. H. 9.

⁷ *Nash v. Union Mut. Ins. Co.*, 43 Me. 343.

the surrender is optional with the insured, and the payment compulsory against the insurers, to the amount not legally appropriated, or liable to be on account of causes already accrued at the time of the surrender, which, as delay works only to the prejudice of the insured, he may make at any time after the alienation.¹

§ 556. **Life Insurance ; Premium Note ; Liability after Lapse of Policy.** — The charter of a life insurance company provided that all who insured with the company should be deemed members while they continued so insured ; also, that the company might take the notes of the members, either in whole or part payment of premium ; also, that if losses were sustained by the company in excess of the funds on hand, the directors might assess the deficiency ratably upon such members, the assessment not to exceed the sum due on the notes, of which sixty days' notice was to be given ; and if the amount assessed was not paid within that time, the party in default was to cease to be a member of the company, and forfeit all preceding payments. It was also provided that if the premium in any case should exceed fifty dollars, one-fourth of the amount should be paid in cash, and the balance might be paid by a secured note subject to assessment.

J. effected insurance with the company, paid one-quarter of the first year's premium in cash, and gave his note for the balance. At the expiration of the first year he paid one-quarter in cash towards the second year's premium, and gave his note for three-quarters of the total premium for the first and second years, and took up his former note. The insured, at the end of the second year, gave up his policy, withdrew from the company, and ceased to be a member thereof. In an action on the last note, after the policy had lapsed, it was held that, in the absence of proof of any assessments to make up deficiencies as provided in the charter, the company was not entitled to recover, the note being regarded as a mere security for the payment of losses, upon assessments made for that purpose.²

¹ *Sullivan v. Mass. Mut. Fire Ins. Co.*, 2 Mass. 318.

² *Mut. Ben. Life Ins. Co. v. Jarvis*, 22 Conn. 133. There was a dissenting
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§ 557. **Right to assess strictly construed.**—An assessment can only be valid when laid under the conditions stated in the

opinion by Ellsworth, J. The whole case is so instructive that we give it more fully in this note. The action was upon the following promissory note and guaranty :—

MIDDLETOWN, October 7, 1848.

\$367 $\frac{50}{100}$

I promise to pay the Mutual Benefit Life Insurance Company, or to the order of their treasurer, three hundred and sixty-seven $\frac{50}{100}$ dollars, for value received, without defalcation or discount, with interest, at six per cent, payable in twelve months after date, or sooner, if required to meet assessments by the company.

GEO. O. JARVIS.

For value received, I guarantee the payment of the above note, and stand security therefor till paid.

WILLIAM JARVIS.

MIDDLETOWN, October 7, 1848.

Received on the within note, as principal, twenty-seven $\frac{50}{100}$ dollars. November 29, 1848.

Hinman, J., for the majority of the court: "The plaintiff's charter makes them in fact, as well as in name, a mutual benefit life insurance company. This is the fundamental principle of their organization. It is implied in their name, and is more fully expressed in the body of the charter, which gives them power to insure the respective lives of their members, and denies them the power to insure any others, by providing that all persons who shall at any time insure in or with said association, shall, while they continue so insured, be deemed and taken as members of the corporation; and provides for an equal assessment upon all the members, in proportion to each member's insurance, to pay for losses which the company may not have funds on hand to discharge.

"The sixth section of the charter authorizes the company to take the notes or obligations of their members for the amount, either in part or in whole, of the premiums of insurance, in proportion to the amount insured; and then in the ninth section it is provided, that if it shall so happen that there shall be just claims on the corporation for losses sustained, to a greater amount than they have funds on hand to discharge, the directors in such case shall proceed to assess such deficiency, in a ratable proportion, on the members of the association, or their lawful representatives, according to the amount of each member's insurance, '*provided that such assessment shall not exceed the amount of the note or obligation given by each member.*' The section further provides, that if, on due notice of his assessment, a member shall neglect to pay the same within sixty days, he shall forfeit all claim to his policy, shall be no longer a member of the association, and shall also be liable to the amount of such assessment in an action of debt. The only provision in the charter relative to the payment of losses is contained in this ninth section; and as the funds of the company are all derived from the payment of premiums by the members, on their respective policies, and as the members are in no event liable to be assessed to any greater amount than their respective notes or obligations, it is clear that the notes or obligations referred to in the ninth section of the charter as liable to this assessment must

charter. A general vote of the directors to assess to a certain amount to pay the indebtedness of the company is no valid

be the notes or obligations which the company are authorized to take of its members for the amount, either in part or in whole, of their respective premiums of insurance; or, as they are called in the rules and regulations of the company, they are the *premium* notes of the members. The finding shows that the note in suit was one of these premium notes; and as the company has met with no losses which make it necessary for them to collect it, and has made no assessment to meet any loss, the question arises whether the defendant is liable upon his note, except for the purpose of meeting a loss, and then only to the extent of an assessment regularly made according to the provisions of the ninth section of the plaintiff's charter. The note is absolute and unconditional in its terms, and as the time it had to run has expired, it appears to be due. If this was all there was in the case, undoubtedly the plaintiffs could recover. It might have been given for money, or it might have been given for the premium, or the portion of it that was, by the agreement of the parties, to be paid in cash, irrespective of any call for losses; and if such was the case it ought to be paid. The finding, however, shows that such is not the case, and, on the contrary, that the understanding upon which this note was given was, that it was not to be paid unless required to meet losses. It was given for a portion of the premium which, by the regulations of the company, it was the intention should be met by the profits of the business, unless required to meet losses. In the prospectus containing the rules and regulations of the company, which was examined by the defendant for the purpose of determining whether he would become a member of the company, and was delivered to him for that purpose by the company's agent, we find one of the first regulations to be that the premium, if over fifty dollars, can be paid, one-fourth in cash and three-fourths in a secured note at twelve months, bearing six per cent interest, and subject to assessment, if required; or it may be paid weekly, monthly, or quarterly. It was under this regulation that the note in suit was given. It was in part a renewal of an original note given for seventy-five per cent of a previous year's premium, and in part for the same percentage on the then accruing year's premium. Under the head of 'mode of payments,' we find this rule repeated in these words: 'If the annual premium is over fifty dollars, he can pay one-fourth in cash and three-fourths in a secured note at twelve months, bearing interest at six per cent, which note is subject to assessment, if required by the directors, and of which sixty days' notice will be given. At the end of the year, if the party so desires he may renew the balance of the old note not then called for, by paying the interest and adding it to the next year's premium note, and paying his twenty-five per cent in cash as at first.' Again, the company anticipated that the members would receive back a large percentage of the amount paid, in annual dividends of profits, to be declared upon the amount of premium; and in order to equalize the benefits to all their members, they provide that *scrip*, bearing six per cent interest, shall be issued to those who pay their premiums in full, which interest is to be paid annually; while those who give and renew their notes are not to receive scrip, but their proportion of profits is carried to their credit, and draws interest, being retained by the company as additional security for the notes.

assessment. It must appear that such a state of affairs existed when the vote was passed as to authorize the vote

Again, the company say that by the system of payments adopted by them, it is easy for all who are not paupers to protect their families from want ; they are not required to pay from year to year in cash a portion of the premium, which is to remain in the hands of the company as profits, but the profits, after a few years, can be used by them to aid in the payment of their annual premium. It is not necessary to allude further to the charter, and the rules and regulations of the plaintiffs' company. Undoubtedly there are other parts of these documents which have a bearing upon the question under consideration. Indeed, the whole tenor of them in connection with the circumstances under which the note in question was executed, goes to show that the only object of the note was to secure the company against losses which might be sustained while the insured remained a member of the association. The charter authorizes the company to take premium notes. It provides how the losses of the company shall be assessed upon these notes. These two provisions are followed up in the regulations of the company, which provide that the parties may renew at the end of the year the balance of the old notes not called for or required by the directors. If it be asked what power the directors had to call for assessments, the answer is in the charter, 'to meet losses.' Indeed, in the argument of the case, counsel seemed to admit that in regard to all who continued members of the company, and chose to renew their notes from year to year, they had a right to do so. It was the expectation of the company that the twenty-five per cent of the premium, which was required to be paid in cash, would be sufficient to meet the ordinary expenses and pay the ordinary losses ; and the seventy-five per cent would never be required to be paid, except perhaps a small balance which might be due at the death of the insured, after deducting the proportion of profits that might be earned by the company, and the balance was then only to be deducted from the amount of the policy. In this way those who paid their premiums in full, by receiving dividends of profits annually, would in the end be made equal with those who only paid twenty-five per cent of their premiums in cash ; and the company prominently held this out as an inducement to persons of limited means to insure their lives in this association ; and it is this principle alone which enables them to say in their prospectus that it is easy for all who are not paupers to protect their families from want, by insuring their lives with them ; and this makes between all the members that mutuality in regard to profits and losses which was contemplated by the charter and the organization of the company. But if the company can collect just such notes as it pleases, without first making an equal assessment upon all, it is clear that there is an end to anything like mutuality. It is not pretended that they do collect the great mass of their premium notes ; but the broad ground is taken that they can collect, or omit to collect, any or all, as the company pleases, thus destroying all mutuality, and leaving the members who have taken their policies upon the faith that they could renew their notes from time to time, unless required to meet losses to be assessed upon all alike, at the mercy of the persons who may be officers of the company for the time being. It is insisted, however, that the provisions of the ninth section of the plaintiff's charter relate only to the members of the

itself, as that losses and expenses had actually been incurred beyond the available assets in hand, which could not be

association, and have no application to the defendant after he ceased to be a member. But the defendant was a member when he gave the note, and it was the act of giving it, and paying that portion of the premium which is required to be paid in cash, that continued to him his right as such member; and we look in vain to the charter or regulations for any different rule or distinction between the notes of the members and those who have ceased to be members. The premium notes all stand upon the same footing; and the character which the charter and the regulations of the association impressed upon them at their inception must remain, unless there is something in the same documents to alter it. The difficulty under which the plaintiff's counsel labor arises from their looking at the absolute terms in which the note itself is expressed. But if we take it in connection with the charter, and consider that it was not an ordinary note, and was never delivered as such, but was delivered as a premium note, under the charter and the regulations of the company, we at once attach to it all the conditions which are expressed in the charter and regulations. By these conditions it appears that it was never an absolute promise to pay, but was a mere security for losses, and merely subject to assessments for losses, and for nothing else; as a conditional security for losses, there was a consideration for it, and to collect it for other purposes would operate as a fraud upon the maker. Again, it is said that the consideration of the note was the premium of insurance on the defendant's life for the year it had to run, and that the defendant had the benefit of the insurance for that year, and in justice ought to pay for the risk. If this was so in fact, we do not see that it would make him liable in any other way than is prescribed in the charter; but enough has been said to show that this is not so. By giving the note, he came under an obligation to pay such assessment for losses, not exceeding its amount, as might be regularly made by the directors: none such has been made, and so there is no obligation to pay; nor is this unjust in regard to the other members of the association. By looking at the tables in the prospectus, it will be seen that the real risk which the company ran, for the year previous to the time the note fell due, was but a trifle over the twenty-five per cent of the premium which was paid in cash. If he had insured for a single year, the premium would have been at the rate of about two per cent on a hundred dollars, whereas, by insuring for life, they charged him nearly five per cent annually. The additional charge undoubtedly arises from averaging the risk among all the years that such a life is estimated to last. Still it is no less true that he paid the company in cash very nearly the full value of the risk the company ran before his policy became void by his withdrawal; and it is this fact which enables the company safely to issue life policies upon the payment of so small a proportion of the premium in cash. If the members withdraw from the association, they have paid in cash the full or about the full value of the risk which the company had run before the withdrawal; and if they do not withdraw when the policy is paid, the company deduct the balance of the premium notes not previously paid by a credit of profits from the sum insured in the policy. Upon this system, the company, if it has correctly calculated the proportion of the

met but by an assessment. The liability of a member of a mutual insurance company on his premium note, left as a

premium which it will require to be paid in cash, is always safe. Indeed, it is for its advantage, after the life policies have run a few years, that the members should avoid their policies by withdrawal, and obviously becomes more and more so by the lapse of time. Indeed, so obvious is this, that the regulations say that the assured can, after a term of years, surrender the policy and receive its equivalent in value ; and this seems to us a sufficient answer to the suggestion that it was a fraud upon the company to take the benefit of the policy for the year before the withdrawal, and not pay the premium charged."

Ellsworth, J., dissented : "My reflections upon this case have brought me to a different conclusion from that expressed by my brethren. Mr. Jarvis, the defendant, applied to the plaintiffs for an insurance upon his life for \$5000, from the 7th of October, 1847. From Carlisle's tables (which were used by the company to ascertain the proper annual premium to be paid by the defendant) it appears, and it was agreed, it should be the sum of \$245 ; one-quarter of this the defendant paid at the time, and gave his note for the remaining three-quarters, payable at the end of the year, 'without default or discount,' with interest. If, at the end of the year, he chose to continue a member of the company by further insuring, he could at his request renew the insurance for another year, by paying twenty-five per cent of the premium for another year, and giving a new note for the amount of the former note and interest and the three-quarters of another \$245, the premium for the second year ; so that the note now in suit consists of premium and interest for two years' insurance. This premium note fell due on the 7th of October, 1849, that being the date up to which he had been insured, and after which he did not ask for further insurance. It will thus be seen that the company had insured the defendant's life for two years, at the stipulated premium ; and how the defendant is to get rid of the payment of this *earned* money, by his own act simply, I have not been able to discover. The money, being earned, can be recovered on the common counts as well as on the special count.

"By the terms of the charter, in the sixth section the company declare 'that it shall and may be lawful for the officers of said corporation to take the notes or obligations of the members for the amount, either in part or in whole, of the premium of insurance, in proportion to the amount insured.' In pursuance of this provision the directors passed a by-law, that, in all cases where the premium was over fifty dollars, the insured might pay twenty-five per cent down, and give his note for the balance, to be paid at the end of the year, with interest, this being the termination of the risk ; and if possible to make this obligation more clear and strong, it was to be paid without defalcation or discount, and might in the mean time be called for, should the company need it to pay losses. It would seem, therefore, that the note in question was understandingly given as an equivalent for the risk taken by the plaintiffs for the defendant's life for the space of two years. So, from the note itself, it seems the promise is *absolute* and *positive*. The money is to be paid in twelve months after date, and *sooner*, if required to meet assessments.

"It is said, however, that the note is not absolute, and is not to be paid, as

deposit as the basis of an assessment should occasion arise, is not an absolute liability to pay the whole amount of his

is written, without defalcation, but is to be paid only upon future assessments. Here, I think, is the great mistake of the defendant's counsel. The defendant, by separating himself from the company, has deprived himself of the privilege contemplated by this provision of the by-law, so that the by-law is not at all applicable to the case of the defendant. The provision is intended for his benefit while he remains a member; but he has forfeited that privilege by his separation. When he ceased to be a member he ceased to be a subject of assessment, both by the charter and the by-laws; for *none but members can be assessed*. Were it indeed practicable to assess those who had been members, for what losses could this be done? those that accrued during membership, or those which may accrue at any future period, upon policies issued during the time of membership?

"It must be conceded that if the defendant is not liable in the present suit he is not liable at all, and yet he has been insured for the agreed premium of \$490, by paying only \$122.50. In the same by-law, to which the defendant refers for his deliverance from this note, we find what I am confident is the only provision applicable to this case. It is this: 'At the end of the year, if the party so desire, he may renew the balance of the old note, not then called for, by paying the interest, adding the next year's premium, and paying twenty-five per cent in cash, as at first.' This the defendant has not desired to do; but, on the other hand, has absolutely refused and neglected to do anything, and yet insists he ought not to pay. He claims that he cannot be assessed, because he is not a member, and that he cannot be compelled to pay without assessments. Thus he would avoid the payment of a note as fairly earned and due as any that was ever presented in a court of justice. I am for holding the defendant to his agreement. If he will not renew his note, nor pay the stipulated twenty-five per cent, nor find satisfactory security, he ought to pay the note *as it is written*; upon his own showing, the assessment provision has nothing to do with the question. And further, the note, under no circumstances, is to be assessed. By the ninth section of the charter, in a ratable proportion the *members* of the association (not the notes of the members) may be assessed. The notes are held to be due and payable as written; and, as I contend, are absolutely payable when and because the members have enjoyed their insurance, and cannot alter their obligations by withdrawing from the company.

"It must be further remembered that these notes, given for earned premiums, constitute the fund of the company to which the public look for the payment of losses; but they now discover that these notes mean nothing and secure nothing. The consequence, too, is that a person may remain a member of the company and be insured for any time, twenty or fifty years, until his premium note shall amount to thousands of dollars, and then retire from the company, repudiate his note, and, if dishonest enough, pursue the same course with another company.

"I would inquire, what is the difference between the person who pays in cash, when the annual premium is less than fifty dollars, and one who pays partly in cash and partly in a promissory note where the premium is more?

note, but it is conditional, and depends upon the contingency of the happening of losses and expenses to which he shall be liable to contribute, which have been duly ascertained by the directors, and which make necessary a resort to an assessment thereon. It is a credit given for a part of the consideration of the contract. The promise of the insured is to pay upon such conditions; and the existence of these conditions must be established affirmatively before a call for the payment of the note or any part thereof can be enforced.¹ The receiver of an insolvent company stands upon no better footing.² Though the premium note be absolute on its face, yet, being given to pay losses, it is only assessable in case of loss.³ And

Upon the hypothesis of the defendant, the latter may pay one-quarter of his premium and be as fully insured as if he had paid the whole. This is a gross absurdity; and I cannot feel that it is at all in accordance with the understanding of the parties, or the public, or with any principles of justice or law with which I am acquainted. From the first breaking of this case I have been at a loss to learn what could be urged by the defendant in favor of this defence.

"Something has been said about the want of mutuality and of consideration, but no question of this kind can arise; for the defendant's life was insured for two years at the price agreed, and that surely is mutuality and consideration enough. And I insist that the defence is nothing but a barefaced attempt to avoid the payment of a clear note of hand. The defendant was fairly and fully insured; and had he died within the two years, his representatives would have been entitled to the five thousand dollars. And yet he asserts that, though he was so insured, he will not fulfil the contract as he made it. He will neither renew nor pay his note, nor remain in a condition to be assessed; and in this defence he has succeeded, as I think, by the prostration of the plainest principles of equity and justice."

¹ *Pacific Mut. Ins. Co. v. Guse*, 49 Mo. 329; *Long Pond Ins. Co. v. Houghton*, 6 Gray (Mass.), 77; *Commonwealth v. Dorchester Mut. Fire Ins. Co.*, 112 Mass. 142; *Nashua Fire Ins. Co. v. Moore*, 55 N. H. 48; *Atlantic Ins. Co. v. Fitzpatrick*, 2 Gray (Mass.), 279; *Thomas v. Whallon*, 31 Barb. (N. Y.) 172; *Bangs v. Gray*, 15 id. 264; *American Ins. Co. v. Schmidt*, 19 Iowa, 502; *Savage v. Medbury*, 19 N. Y. 32; *Bangs v. Duckinfield*, 18 id. 592; *Stow v. Wadley*, 8 Johns. (N. Y.) 124; *Bangs v. Gray*, 2 Ker. (N. Y.) 477; *Herkimer County Mut. Ins. Co. v. Fuller*, 14 Barb. (N. Y.) 373; *Devendorf v. Beardsley*, 23 id. 656; *Appleton Mut. Fire Ins. Co. v. Jesser*, 5 Allen (Mass.), 446; *Ohio Mut. Ins. Co. v. Marietta Woollen Co.*, 3 Ohio St. 348; *Atlantic Mut. Fire Ins. Co. v. Young*, 38 N. H. 451.

² *Jackson v. Roberts*, 31 N. Y. 304; *Empree v. Shideler*, 36 Ind. 423.

³ *Insurance Co. v. Jarvis*, 22 Conn. 133. It is said in *Kelly v. Troy Fire Ins. Co.*, 3 Wis. 229, 254, that an assessment may be made in anticipation of losses, as otherwise great delay would be experienced in adjusting and paying them. But the objection urged in that case, that if assessments are made upon the pre-

the assessment must be made in strict accordance with the authority given. Even a more equitable mode than that provided by the charter cannot be adopted.¹ Where the charter authorizes the directors to make an assessment, it can be made by them only; and if they vote to assess to a certain amount, and thereupon refer the matter to a committee to make the assessment, who — a minority of the directors — assess a different and less sum, the assessment is invalid; so held in an action on a note to recover such an assessment.² And a by-law which authorizes an assessment to a larger amount than is permitted by the charter is invalid; and an agreement signed by the secretary, without the authority of the directors, not to assess.³ So is an assessment to pay losses and expenses, the charter authorizing an assessment only to pay losses.⁴ So a vote to make an assessment, leaving the per cent or amount in blank, is invalid;⁵ and so is a vote to assess, passed by a board of directors, illegally elected;⁶ although an assessment was held valid made by directors, out of whom a president was to be chosen, though the president was chosen before the directors were.⁷ And assessments can only be laid by the corporation or a receiver, clothed with such of its powers as may be necessary for winding up its affairs, under the direction of the court. An assignee of the corporation not in bankruptcy has no such power.⁸ And it is of importance to observe that in some cases these different classes of assessments may be provided for with penalties for

mium notes before losses have occurred, the right to withdraw, upon payment of the share of losses assessable while the policy was in force, cannot be availed of, because money to pay assessments will be taken when no loss has occurred, may perhaps be entitled to more favor than was allowed in that case.

¹ Slater Mut. Ins. Co. v. Barstow, 8 R. I. 343.

² Monmouth Mut. Fire Ins. Co. v. Lovell, 59 Me. 564; Farmers' Ins. Co. v. Chase, 56 N. H. 341.

³ Nat. Mut. Fire Ins. Co. v. Yeomans, 8 R. I. 25.

⁴ Bersch v. Sinnissippi Ins. Co., 28 Ind. 64.

⁵ St. Lawrence Mut. Ins. Co. v. Paige, 1 Hilton (N. Y.), 430.

⁶ People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.), 440.

⁷ Currie v. Mut. Ass. Co., 4 H. & M. (Va.) 315, 318.

⁸ Hurlburt v. Carter, 21 Barb. (N. Y.) 221.

non-payment in one case, but not in the other.¹ [The rule of assessment agreed on with the members of a mutual company must be followed.²]

§ 558. **Slight Errors do not invalidate Assessments.** — Slight and unintentional errors, however, in estimating the amount which it may be necessary to assess, or in making up the lists of those liable to assessment, will not vitiate the assessment, the assessment being substantially correct, made in good faith, and upon correct principles. "Nor will assessments be invalidated by delay, not unreasonable, in making them; nor by variance at different times between the proportions of the cash premium to the amount of the deposit note, as against members suffering no injury thereby.³ Nor can an assessment be resisted on the ground that claims for losses found due, allowed by the directors, might have been successfully resisted on technical grounds.⁴ Nor need assessments be made literally "forthwith" after every loss, nor separately for each loss. Some reasonable and practicable rule approximating to it is sufficient,⁵ and the whole amount of the note may be assessed, though the insured have no interest in a part of the property covered by the policy. And if losses occur at one and the same time, sufficient to absorb all the company's resources from premium notes, whether the notes be classified or not, one assessment, or call for the whole, will be valid.⁶ And loss by a subsequent fire cannot be paid, or any part of it, since the entire fund is absorbed by the first fire.⁷

§ 559. **What Assessments may include; Insolvency; Set-off.** — The intentional omission of members who are liable to any considerable amount will vitiate the whole assessment.⁸ But

¹ *Rix v. Mut. Ins. Co.*, 20 N. H. 198.

² [*Susquehanna Mut. Fire Ins. Co. v. Gackenbach*, 115 Pa. St. 492.]

³ *Marblehead Mut. Ins. Co. v. Underwood*, 3 Gray (Mass.), 210.

⁴ *Sands v. Hill*, 42 Barb. (N. Y.) 651.

⁵ *New England Mut. Ins. Co. v. Belknap*, 9 Cush. (Mass.) 140; *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. (N. Y.) 605.

⁶ *Rhinehart v. Alleghany County Mut. Ins. Co.*, 1 Pa. St. 359; *Commonwealth v. Mechanics' Mut. Ins. Co.*, Sup. Jud. Ct. Mass., March, 1873; *Sands v. Sanders*, 28 N. Y. 416.

⁷ *Coston v. Alleghany County Mut. Ins. Co.*, 1 Barr (Pa.), 419.

⁸ *Marblehead Mut. Fire Ins. Co. v. Hayward*, 3 Gray (Mass.), 208; *Herkimer*

the omission of a few adjusted and cancelled policies, so small in amount as not materially to increase the assessment on the remainder, will not have this effect.¹ But in determining whether there are earned premiums available to pay losses, uncollectible and worthless claims may be disregarded.² In fixing the amount to be assessed, interest on borrowed money, probable failures in the collection, a reasonable sum for the expense of collection, and a reasonable allowance by way of discount for prompt payment, may be taken into account.³ So may return premiums due on surrendered and cancelled policies.⁴ The amount of such overlay must be reasonable.⁵ Twenty-four per cent was held to be reasonable in People's Equitable Mutual Fire Insurance Company, Petitioners;⁶ but double the amount was held to be unreasonable and excessive, in the absence of special circumstances shown to justify it, in the case of the same company against Babbitt.⁷ Ninety-five per cent "to meet estimated bad debts, interest, expenses, and costs of collection" was held illegal, where the charter provided

County Mut. Ins. Co. *v.* Fuller, 14 Barb. (N. Y.) 373; People's Eq. Mut. Ins. Co. *v.* Arthur, 7 Gray (Mass.), 267.

¹ Fayette Mut. Fire Ins. Co. *v.* Fuller, 8 Allen (Mass.), 27.

² Maine Mut. Mar. Ins. Co. *v.* Neal, 50 Me. 301.

³ Jones *v.* Sisson, 6 Gray (Mass.), 288; Bangs *v.* Gray, 2 Ker. (N. Y.) 477; reversing s. c. 15 Barb. (N. Y.) 264.

⁴ Fayette Mut. Fire Ins. Co. *v.* Fuller, 8 Allen (Mass.), 27.

⁵ [An assessment should not be larger than necessary to meet existing claims and reasonable expenses, and if unreasonably excessive it is void. People's Eq. Mut., &c. *v.* Babbitt, 7 Allen, 235 at 238. The court cannot say however that an assessment by a receiver of 100 per cent in excess of liabilities is not warranted, and made in good faith, without evidence that it is unreasonable and excessive. Wardle *v.* Townsend, 75 Mich. 385. In this case it appeared that the receiver thought that the assessment of \$50,000 would not bring in more than \$25,000, and he thought to save the expenses of a second assessment by going high enough at first to cover his needs. And mere excess in the assessment will not prevent the company from recovering it unless the excess is so great as to satisfy the jury of fraud or gross mistake. Susquehanna Mut. Fire Ins. Co. *v.* Gackenbach, 115 Pa. St. 492.]

⁶ 9 Allen (Mass.), 319.

⁷ 7 Allen (Mass.), 235. This case was, however, overruled in Commonwealth *v.* Dorchester, &c. Ins. Co., 112 Mass. 146, where the discretion of the directors empowered to make the assessment was held to be decisive and final, the provisions being to pay such sums as they should assess. The case seems, however, to have been followed in *Rosenberger v. Washington Ins. Co.*, 87 Pa. St. 207.

for "losses and other expenses."¹ Involuntary payments made under a prior illegal assessment may be treated as a portion of the just claims upon which to make the new assessment, and in the collection of the latter each member is to be credited with the amount of his payment under the illegal assessment.² In Indiana, however, it appears that the statute prohibits any overlay to cover expenses.³ Where the assessments are to pay losses, and the premium on deposit notes is made payable by instalments as shall from time to time, agreeably to the by-laws, be required by the directors, the directors having ascertained that the company is liable for a loss, and that the company have not sufficient available funds to pay the loss, are first to ascertain who were members at the time of the loss, and to assess upon each such proportion thereof as his individual liability bears to the aggregate liability of all the members. The length of time which may have elapsed since membership began is not to be taken into account.⁴ And although assessments cannot be made for losses occurring prior to membership, unless the parties so agree,⁵ the inclusion of such losses will not invalidate the assessment as to those who were members when the losses occurred.⁶ Where the policies ran for one, three, and five years respectively, the premiums for three years being at twice the rate for one, and those for five years at three times the rate for one, and in computing the amount to be assessed for each month's losses a basis was found by taking the whole of the premium for each yearly policy, one-third of that for each three years' policy, and one-fifth of that for each five years' policy, the court thought there was no such inequality as to require the assessment to be set aside.⁷ So where, after a former assessment has been adjudged illegal, it is found that two years be-

¹ York, &c. Ins. Co. v. Bowden, 57 Me. 280, 287.

² People's Eq. Mut. Fire Ins. Co., 9 Allen (Mass.), 319.

³ Sinnissippi Ins. Co. v. Taft, 26 Ind. 240.

⁴ Herkimer County Mut. Ins. Co. v. Fuller, 14 Barb. (N. Y.) 373.

⁵ Commonwealth v. Mechanics' Mut. Ins. Co., 112 Mass. 192; Planters' Ins. Co. v. Comfort, 50 Miss. 662.

⁶ Long Pond Mut. Fire Ins. Co. v. Houghton, 6 Gray (Mass.), 77.

⁷ Citizens' Mut. Fire Ins. Co. v. Sortwell, 10 Allen (Mass.), 110.

fore a large debt was due from the company, and that many of the members who paid the illegal assessment have become, by lapse of time, exempt from a new assessment, so that, if the debt should be assessed on policies which were in existence when the several items of debt accrued and are still liable to assessment, there would not be premium notes sufficient in amount to pay all, the whole debt may be taken as a unit, and assessed upon all the policies which were then outstanding, in proportion to the time of their existence and the amount of their premiums. And in making such assessment for just claims which have accrued within two years, the aggregate of the whole net expense, and of the sums received in payment of the illegal assessment during each year, may be divided by twelve to ascertain the average amount to be raised for each month during that year; to which may be added the losses in each month. And the sum thus ascertained may be taken to be the sum to be raised for each month, in proportion to the amount of the premiums paid therefor applicable to that month.¹ But the assessment must not include the amount of a previous assessment for losses which have been paid;² nor a deficiency arising from uncollected assessments not made during the existence of a policy.³ In *Planters' Insurance Company v. Comfort*,⁴ it was held that the assessment would not be valid if it included a sum sufficient to pay prior assessments during the currency of the policy, which the directors had negligently suffered to remain uncollected. But their negligence is his negligence. Their bad management is his bad management, which he cannot set up in his own defence.⁵ And a new assessment, calling for the whole amount due on a note, is valid, although there is a prior assessment calling for a part which is still uncollected.⁶ If the prior assessment be

¹ *People's Eq. Mut. Fire Ins. Co., Petrs.*, 9 Allen (Mass.), 319.

² *Cooper v. Shaver*, 41 Barb. (N. Y.) 151.

³ *Farmers' Mut. Ins. Co. v. Chase*, 56 N. H. 341.

⁴ 50 Miss. 662.

⁵ *West Branch Ins. Co. v. Smith, C. C. P. (Pa.)*, 5 Ins. L. J. 319.

⁶ *Sands v. Sweet*, 44 Barb. (N. Y.) 108, overruling *Campbell v. Adams*, 38 Barb. (N. Y.) 132, to the contrary. See also *Jackson v. Van Slyke*, 44 id. 116 note.

illegal, it may be disregarded, and if paid in part, the amount paid may be included amongst the liabilities.¹ The liability to assessment is fixed at any time only by the amount of losses for which the company is at that time responsible, and it is not apportionable according to the ratio of time of the expired and the unexpired term of the policy, provided the amount of the losses is sufficient to absorb the whole.² When this is the case, the assessment cannot be reduced, or any part of it withheld to provide future indemnity for members who have not already suffered loss. Where the whole proceeds of the conditional as well as the absolute funds — that is, cash, premium notes, and statute liability to assessment — are pledged to satisfy and make good the losses that have occurred, each one in turn, who suffers loss, is entitled to the full benefit of this pledge, according to the state of those funds when his loss occurs. This forbids any reduction of the fund when the whole is required to cover losses, either by apportionment, set-off, or otherwise. The directors of the company are not bound to provide for reinsurance either by reserving a fund therefor, or by an allowance to policy-holders whose policies are cancelled; and they have no right to do so to the prejudice of the superior claims of those who have suffered losses upon their policies.

And if in case of insufficiency, “a just average” is to be made in such proportion as the loss sustained by each party “bears to the whole amount of losses then remaining unpaid,” this rule, established by the contract of the corporation with all its members alike, does not permit a set-off, even as between the company and those who have claims for losses, upon which they are entitled to a distributive share of the proceeds of the assessment.

Accrued profits, although credited to the several policies according to the share of each therein, remain as absolute funds of the corporation pledged to the payment of losses, until by expiration or cancellation of the policy its holder becomes entitled to withdraw the balance, after charging for losses as the “dividend due to his policy.” The members

¹ People's Mut. Fire Ins. Co. v. Allen, 10 Gray, 297, 301.

² Commonwealth v. Union Mut. Ins. Co., 112 Mass. 116.

are entitled to a dividend only of such profits as remain or are shown upon a valuation of their policies at the termination of their membership.

If the payment of expenses and losses and return premiums are only provided for, the insured is not entitled to withhold, or to have withheld for him, for his own future indemnity, any part of the fund; and, therefore, the loss of the unexpired term of his policy, whether by cancellation or by insolvency of the company, can give him no claim against the corporation, either as a debt or by way of damages for non-fulfilment of its contract with himself.¹ In case of insolvency there can be no assessment for the payment of interest, or for the payment of the value of unexpired policies, or unearned premiums.² And if the assessment is to be in proportion to premiums and deposits, no distinction of age in the policies can be made,³ nor can any set-off be allowed on account of any supposed value of the policy.⁴

§ 560. **Assessment; Classification of Risks and Funds.** — If the charter clothes the directors with the power of classifying policies under certain stated risks, and under this provision a policy is placed in one of the classes, it will be valid although in contravention of a by-law of the corporation. The directors may waive the latter.⁵ When a classification of risks is authorized by the charter, and the funds of one class are set apart to pay the losses in that class, the losses in both classes are payable by the company, and the assessment is in form by the company, and not by the particular class. The whole company acts for each particular class.⁶ But, though the assessment be made by the company, the funds raised on notes in one department only must first be appropriated to pay the losses of that department.⁷ The directors cannot, however, classify risks and make different rates of assessment

¹ *Commonwealth v. Union Mut. Ins. Co.*, 112 Mass. 116.

² *Commonwealth v. Massachusetts Mut. Ins. Co.*, 112 Mass. 116.

³ *Commonwealth v. Mechanics', &c. Ins. Co.*, 112 Mass. 192.

⁴ *North Carolina, &c. Ins. Co. v. Powell*, 71 N. C. 389.

⁵ *Union, &c. Ins. Co. v. Keyser*, 32 N. H. 313.

⁶ *Kelly v. Troy Fire Ins. Co.*, 3 Wis. 229, 254.

⁷ *Allen v. Winne*, 15 Wis. 113.

without the authority of the charter, or a vote of the members.¹ Nor can the assessment be by classes, when authorized, unless the amounts insured in the respective classes have reached the required amount.² And when assessment is by classes, and the means of one class are insufficient to pay the losses of that class, resort may be had to the other class, if anything remains after paying the losses of that class.³ If a certain class of funds is to be resorted to in the first instance for payment, these must be exhausted before others can be availed of by assessment.⁴ But if there is no such distinction, all are to be assessed alike.⁵ And if the funds raised are to be appropriated for the payment of certain claims in successive order, the first must be paid *in toto* before anything can be appropriated for the payment in the next succeeding class, as for return of premiums, for instance.⁶

[§ 560 A. **Extent of Liability to pay Assessments.** — Where a policy is to be suspended during default of payment of annual interest the member may nevertheless remain liable for losses. If such is the agreement there is no reason why it should not be enforced.⁷ Where A. takes out a policy in a mutual company, giving his note for a certain sum payable in such amounts and at such times as the directors under the charter and by-laws may determine, and a by-law provided that in case of loss the company should retain the premium note and such part of the funds called for by the loss, not exceeding the amount still unpaid on the premium note, as would be suffi-

¹ *Thomas v. Achilles*, 16 Barb. (N. Y.) 491; *Currie v. Mut. Ass. Soc.*, 4 H. & M. (Va.) 315; *People's Eq. Mut. Ins. Co. v. Arthur*, 7 Gray (Mass.), 267.

² *Augusta Mut. Ins. Co. v. French*, 39 Me. 522.

³ *White v. Ross*, 15 Abb. Pr. (N. Y.) 66. In Massachusetts, by statute, where the affairs of an insurance company have been placed in the hands of a receiver, an assessment may be made by him, which, being ratified by the court, on a bill in equity, concludes all parties in interest; and, upon decree of confirmation, executions may issue for the respective amounts against those upon whom they are assessed. *Hamilton Mut. Ins. Co. v. Parker*, 11 Allen (Mass.), 574.

⁴ *Long Pond Ins. Co. v. Houghton*, 6 Gray, 77.

⁵ *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen (Mass.), 27.

⁶ *Commonwealth v. Union Mut. Ins. Co.*, 112 Mass. 116; *Commonwealth v. Mass. Mut. Fire Ins. Co.*, *id.*

⁷ [*Webb v. Mut. Fire Ins. Co.*, 63 Md. 213.]

cient to secure the payment of assessments by the assured during the continuance of his policy after said loss, it was held that the company had a lien for assessments, subsequent to the loss up to the expiration of the policy, on the money paid into court upon a judgment on the policy for the payment of the loss by the company.¹ Where the insured is to be liable for assessments during the term of his policy and this provides for its surrender in case the property is sold, the liability for assessments continues during the term although the buildings are destroyed and the land sold, if no surrender is made.² A by-law may lawfully make policies liable for assessments though issued subsequently to the loss for which the assessment is made.³ But an action cannot be brought to recover quotas and requisitions accruing after the policy has become void by other insurance.⁴ And an insurance company cannot maintain an action for premiums, assessments, &c., on policies which have never left their hands or been signed by the assured, when all that the latter has done is to make written application for the same, refusing on seeing them to take them.⁵ The liability of members to pay their portion of losses and liabilities under the organic law of the company cannot be varied by agreement between the company and a member.⁶ Where a member may by the organic law withdraw and cancel his policy on payment of his proportion of losses and assessments then existing, *subsequent* assessments to cover subsequent losses from failure to collect or other cause cannot affect him.⁷ A member of a mutual company is liable on an assessment to cover a loss occurring during his membership, although the assessment be not levied until nine years after his policy expired, and the company has six years

¹ [Appeal of Susquehanna Ins. Co., 105 Pa. St. 615.]

² [Thropp v. Insurance Co., 125 Pa. St. 427.]

³ [Susquehanna Mut. Fire Ins. Co. v. Stauffer, 125 Pa. St. 416. See Thropp v. Insurance Co., id. 427.]

⁴ [Mut. Ass. Soc. v. Holt, 29 Grat. 612 at 625.]

⁵ [Real Estate Mut. Fire Ins. Co. v. Roëssle, 1 Gray (Mass.), 336 at 337.]

⁶ [Russell v. Berry, 57 Mich. 287.]

⁷ [Union Mut. Fire Ins. Co. v. Spaulding, 61 Mich. 77; Tolford v. Church, 66 Mich. 431.]

after *levy* of the assessment in which to sue for it.¹ The insured may defend a suit for assessments on the ground of fraudulent representations inducing him to contract with the company.² But where one signs an application without reading it and receives a policy in accordance with it, which he retains a long time without reading, he cannot then claim that by a mutual mistake the application and policy were not of the variety he wanted. Parol evidence of representations made by the agent prior to the contract are inadmissible to enable the insured to escape the liabilities imposed on him by the policy, nor will returning the policy to the agent relieve the assured from assessments. One cannot accept and retain the protection of a policy and then repudiate its liabilities.³ The holder of a policy who has a chance to look at it before he accepts it is held to have notice of its contents, in the absence of fraud, and he cannot allege ignorance to excuse non-compliance with conditions.⁴ Neither will a plea avail that the term broken was cunningly hidden away among a mass of fine print so as to be illegible and unintelligible, where it appears that, although fine, the print was legible. When the assured accepts a policy without dissent the law presumes that he knows and assents to its contents.⁵

[§ 560 B. **Forfeiture by Non-Payment of Assessment** will occur if such is the agreement, just as in the case of the non-payment of any other premium. Sometimes default only suspends the policy,⁶ and a failure to pay an assessment falling due after loss is not fatal,⁷ unless so agreed,⁸ as where the policy continues alive after a loss and will cover other and subsequent losses. A member does not forfeit by neglecting to pay an assessment not made in accordance with the provisions of the constitution of the order, although it was in

¹ [Smith v. Bell, 107 Pa. St. 352.]

² [Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526.]

³ [Susquehanna Mut. Fire Ins. Co. v. Swank, 102 Pa. St. 17.]

⁴ [Morrison v. Insurance Co., 69 Tex. 353.]

⁵ [Monitor Ins. Co. v. Buffum, 115 Mass. 343 at 345.]

⁶ [Lycoming Fire Ins. Co. v. Rought, 97 Pa. St. 415.]

⁷ [Seyk v. Millers' Nat. Ins. Co., 74 Wis. 67.]

⁸ [See § 560 A.]

accord with a custom of the order with which the member was not shown to be acquainted.¹ An assessment unsigned and incomplete² or made by the wrong persons³ will not be sufficient to base a forfeiture. If the company has gained profits for its members, the share of a delinquent must be applied in satisfaction of what is due from him, for example, interest on premium notes, to prevent a forfeiture.⁴ In a mutual company every member is interested in profits and involved in losses. The essence of mutuality is, that those who contribute to produce assets are interested in proportion to their contribution.⁵ And the insured is entitled to know the amount of interest due after deducting his share of the profits, before a forfeiture for non-payment of interest can be claimed.⁶ Where the by-laws provide that a policy suspended by non-payment of assessment may be revived by payment of all dues within three months after the forfeiture, such payment is all that is necessary, and the usage of the society cannot attach other requisites to the contract against the rights of a member.⁷ Where a by-law gives the board of directors power to reinstate a member on his presenting a sufficient excuse for failure to pay an assessment promptly, and making up the same, and the board improperly refuses to so reinstate a member on a proper excuse, because he is in ill health (and he dies soon after), equity will determine the adequacy of the reason so offered, and in a proper case compel the company to pay the insurance.⁸ Whether inability by reason of a sudden calamity is a "valid reason" for not paying an assessment on time is for the jury.⁹ The company's books are the best evidence of an assessment and of forfeiture. The testimony of officers is secondary evidence.^{10]}

¹ [Underwood v. Iowa Legion of Honor, 66 Iowa, 134.]

² [Baker v. Citizens' Mut. Fire Ins. Co., 51 Mich. 243.]

³ [Bates v. Detroit Mut. Ben. Ass., 51 Mich. 587.]

⁴ [Northwestern Mut. Life Ins. Co. v. Fort's Adm. 82 Ky. 277.]

⁵ [Carton v. Southern Mut. Ins. Co., 72 Ga. 371-373.]

⁶ [Eddy v. Phoenix Mut. Life Ins. Co., 18 Ins. L. J. 804 (N. H.), March, 1889.]

⁷ [Manson v. Grand Lodge, 30 Minn. 509.]

⁸ [Van Houten v. Pine, 38 N. J. Eq. 72. (The money had been given to a director to pay the assessment, but he forgot it.)]

⁹ [Dennis v. Mass. Ben. Ass., 47 Hun, 338.]

¹⁰ [Dial v. Valley Mut. Life Ass., 29 S. C. 560.]

§ 561. **Premium Notes, when recoverable to the Full Amount without Assessment.** — In some cases it is provided by the charter or by-laws that, in case of neglect to pay an assessment for a specified time, the whole amount of the deposit note may be sued for and recovered. If, in such case, an assessment has been paid, the whole amount recoverable is the face of the note less the paid assessments,¹ but without interest, as the right to recover the whole amount is in the nature of a penalty, which carries no interest.² And the failure to pay such an assessment excludes the insured from his right to indemnity in case of loss,³ unless the by-laws treat the note "as payment in advance" of the assessment,⁴ in which case the right will remain intact, although the charter provides that if he neglect to pay an assessment he shall cease to have his property insured until he pays.

[§ 561 A. **What is a Waiver of Forfeiture for Non-payment.** — Where a course of dealing has induced a member to suppose that assessments will be received after the time limited the company is estopped to insist upon a forfeiture.⁵ But the insured cannot take advantage of such a course of dealing when it was not known to him, or known only by a few instances in his own case.⁶ Forfeiture or suspension for non-payment of assessments may be waived by any act recognizing the policy as still existing.⁷ The failure to pay within the proper time after the first notice is waived by sending a second notice after the expiration of such time.⁸ If a company makes an assessment on a member after a former assessment is overdue and unpaid, it waives the forfeiture for such non-payment.⁹ Collecting any assessment waives the non-payment of prior assessments.¹⁰ The levy and acceptance of an assessment without

¹ *Bangs v. Bailey*, 37 Barb. (N. Y.) 630.

² *Ibid.*; *Bangs v. McIntosh*, 23 Barb. (N. Y.) 591.

³ *Beadle v. Chenango County Mut. Ins. Co.*, 3 Hill (N. Y.), 161.

⁴ *King v. Mut. Ins. Co.*, 20 N. H. 198.

⁵ [*Nat. Mut. Ben. Ass. v. Jones*, 84 Ky. 110.]

⁶ [*Bosworth v. Western Mut. Aid Soc.*, 75 Iowa, 582.]

⁷ [*Olmstead v. Farmers' Mut. Fire Ins. Co.*, 50 Mich. 204.]

⁸ [*Shay v. National Ben. Soc.*, 54 Hun, 109.]

⁹ [*Stylov v. Wis. Odd Fellows Mut. Life Ins. Co.*, 69 Wis. 224.]

¹⁰ [*Rowswell v. Equitable Aid Union*, 13 Fed. Rep. 840 (N. Y.), 1882.]

condition after the conditional acceptance of a prior overdue payment, is a waiver of the right to avoid the certificate for delay of payment. "An unconditional acceptance upon assessment waives all former known grounds of forfeiture."¹ If a branch of a benevolent institution advances to the parent body an assessment due from a member, this waives the suspension of such member provided for in the by-laws, and his family is entitled to the usual benefit although the secretary may have marked the member "suspended."² But where payments were overdue, and the secretary wrote the assured that if they were made *immediately* the default would not be insisted on, and twenty-four days after when the assured was sick the money was sent, and receipts were returned by the company, which provided in print that they should be valid only in case the insured were alive and well at their date, and the words "no default" were written across the face of each receipt, it was held that there was no waiver. The written words must be construed in connection with the print, and meant that there was no default *if* the insured were alive and well, which he was not.³ A certificate of membership in a beneficiary association provided that failure to comply with the rules of the association as to payment should render it void, and a rule of the association provided that if an assessment was not received within thirty days after mailing the notice the party's contract with the association should be void, but he might renew his connection as at first joining, or for valid reasons might be reinstated on paying arrearages. C. was habitually unpunctual, and many times the company received assessments after they were due, making C. each time sign a certificate that he was in good health. At last C. failed to pay an assessment within the thirty days and died before paying it. It was held that the facts showed no waiver of the rule of forfeiture by the company.⁴

¹ [Rice v. N. E. Mut. Aid Soc., 146 Mass. 248, 252; Rindge v. N. E. Mut. Aid Soc., 146 Mass. 286.]

² [Schen v. Grand Lodge, &c. Ind. Forresters, 17 Fed. Rep. 214 (Ohio), 1883.]

³ [Servoss v. Western Mut. Aid Soc., 67 Iowa, 86.]

⁴ [Crossman v. Mass. Ben. Ass., 143 Mass. 435.]

§ 562. **Notice of Assessment.** — The insured is entitled to notice of an assessment before suit is brought.¹ But the courts will be liberal in construing what amounts to proof and notice.² If the assessment be properly laid but improperly notified, no forfeiture is incurred by failure to pay it.³ But if the notice be properly sent, by mail for instance, its miscarriage, or failure to reach its destination, or the absence of the insured, will not excuse non-payment within the prescribed time.⁴ Unless some special mode or form of notice of the assessment be required by the charter or by-laws, personal service will be sufficient publication.⁵ Nor need the notice specify the amount due on each note.⁶ The rate per cent will be sufficient, or any notice which will enable the insured to determine by calculation the amount which he will be called on to pay, and not incumbered by matter which misleads.⁷ And notice required to be by mail or otherwise is sufficient, if deposited in the post-office directed to the place of residence indicated in the policy.⁸ And the "date of the notice" from which is reckoned the time within which the assessment must be paid will be not the date written in the notice, or the day on which it is sent, but the date of its arrival at the post-

¹ *Columbia Ins. Co. v. Buckley*, 83 Pa. St. 293.

² *Williams v. German, &c. Ins. Co.*, 68 Ill. 387; *Hollister v. Quincy Mut. Ins. Co.*, 118 Mass. 478.

³ *Frey v. Mutual Fire Ins. Co., &c.*, 43 U. C. (Q. B.) 102.

⁴ *Greeley v. Iowa St. Ins. Co.*, 50 Iowa, 86.

⁵ *Jones v. Sisson*, 6 Gray (Mass.), 288; *York County Mut. Fire Ins. Co. v. Knight*, 48 Me. 75.

⁶ *Atlantic Mut. Fire Ins. Co. v. Sanders*, 36 N. H. 252.

⁷ *Bangs v. Duckingfield*, 18 N. Y. 592.

⁸ [In general it is true that the company fulfils its duty by mailing notice of the assessment, and if it fails to reach the assured by miscarriage or by his absence, non-payment of the assessment within the required time is not excused. *Weakly v. Northwestern Ben. & Mut. Aid Ass.*, 19 Brad. 327. And the holder of an accident certificate is bound by a by-law of the company providing that notice of an assessment put in the mail addressed to the last given address of the member shall be legal notice, whether in fact received or not. *Union Mut. Acc. Ass. v. Miller*, 26 Brad. 230. But if the charter provides that the members shall be notified of assessments, mailing is not enough, the notice must be actually received: *Castner v. Farmers' Mut. Fire Ins. Co.*, 50 Mich. 273; and it must be notice of the assessment, not of forfeiture. *Bates v. Detroit Mut. Ben. Ass.*, 51 Mich. 587.]

office to which it is sent.¹ A change of residence not made known to the company is without effect upon them.² If by the terms of the by-laws notice of an assessment is to be given, an action for recovery of the assessment cannot be maintained by the company or its receiver without first giving the notice.³ [When the charter requires that notice of assessments shall be published and advertised, publication in a newspaper is what is meant.⁴] If publication of notice for three weeks be required, and after assessment is made the company goes into the hands of the receiver, there being no company to give the required notice, actual notice by the receiver, before action brought, will suffice.⁵ The notice should not be given till the assessment is made.⁶ Notice of an intention to assess is not necessary, unless required by the by-laws or charter. Assessments at the regular meeting of the directors are presumably a part of the business of the company, and no notice is required. And as this is a part of the duty of the directors, made so by statute, a by-law authorizing the directors to lay an assessment at a meeting called for that purpose, neither restricts nor enlarges the power of the directors.⁷ The notice, when required, should be given to the member of the company insured, although there has been an assignment of the policy with the consent of the company;⁸ unless by the giving a new premium note, or assuming the liability on the original, the assignee becomes a member; in which case he should be notified, and not the original insured.⁹ [Unless notice of assessment is sent reasonably soon after its date, the time allowed for payment will not run from such date.¹⁰ If assessments are to be paid within thirty days after notice, in

¹ *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88.

² *Lothrop v. Greenfield Stock & Mut. Fire Ins. Co.*, 2 Allen (Mass.), 82.

³ *Williams v. Babcock*, 25 Barb. (N. Y.) 109.

⁴ [*Pennsylvania Training School v. Independent Ins. Co.*, 127 Pa. St. 559.]

⁵ *Cooper v. Shaver*, 41 Barb. (N. Y.) 151.

⁶ *Bangs v. McIntosh*, 23 Barb. (N. Y.) 591.

⁷ *Bay State Mut. Fire Ins. Co. v. Sawyer*, 12 Cush. 64; *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen (Mass.), 27.

⁸ *Brannin v. Mercer County Mut. Ins. Co.*, 4 Dutch. (N. J.) 92.

⁹ *Bowditch Mut. Fire Ins. Co. v. Winslow*, 3 Gray (Mass.), 415.

¹⁰ [*Stanley v. Northwestern Life Ass.*, 36 Fed. Rep. 75 (Ky.), 1887.]

the absence of notice no tender of annual or other assessments is necessary to save forfeiture,¹ and the notice must conform to the agreement and not require the payment of more than is thereby due.^{2]}

§ 563. **Mutual Insurance; Lien; Contract with Parties out of the State.** — A mutual insurance company of New York, empowered to do business in a particular county, and having by its charter a lien upon real estate insured by it upon filing notice, it has been held in Canada, cannot make there a valid contract with a citizen of Canada for the insurance of his buildings. Such a contract is void *ab initio*. There could be no mutuality in such a contract, and the insured could not subject his property to the required lien.³ But in an action against the same company, the New York courts held that the company might lawfully make in New York a contract to insure personal property situated in Canada and belonging to a person residing there.⁴ And it is well settled that as between the States of the Union mutual insurance companies incorporated in one State may make in other States valid contracts of insurance, both of the real and personal property of citizens of other States, although doubtless without the permission of the foreign State, no lien in such case will attach to the real estate. The practice of mutual insurance companies to insure both real estate and personal property upon which they can have no lien is generally, if not universally, upheld.

The lien given by charter upon the property insured is ineffectual as against a *bona fide* purchaser,⁵ unless by express provision it is made to run with the land.⁶ [A company may still assert its lien for assessments on funds paid into court by it in settlement of a loss, although in another suit it has been determined that the company could not sue for the as-

¹ [Covenant Mut. Ben. Ass. v. Spies, 114 Ill. 463.]

² [Mutual Endowment Assess. Ass. v. Essender, 59 Md. 463.]

³ Genesee Mut. Ins. Co. v. Westman, 8 U. C. (Q. B.) 487.

⁴ Western v. Genesee Mut. Ins. Co., 2 Ker. (N. Y.) 258; Columbia Fire Ins. Co. v. Kinyon, 37 N. J. L. 33.

⁵ Kentucky, &c. Ins. Co. v. Mathers, 7 Bush (Ky.), 23; McCulloch v. Indiana, &c. Ins. Co., 8 Blackf. (Ind.) 50.

⁶ Shirley v. Mut. Ass. Soc., 2 Rob. (Va.) 705.

sessments because it had failed to give the proper notice of them, nor is it estoppel to assert such lien by reason of having sought to defend the suit of the assured by maintaining that the policy was forfeited.^{1]}

[§ 563 A. **Suit against the Company on a Mutual Policy.** — When the insured is to receive a sum equal to the amount received from a death assessment, not exceeding \$3000, after proof of loss, satisfactory proof of loss constitutes a demand of payment, and the company cannot excuse non-payment on the ground that no assessment has been made; it is its duty to make the assessment.² And a suit may be brought for the neglect to make an assessment.³ And an action will be sustained on the policy for the maximum amount it calls for, unless the company can show that an assessment at the proper time would not produce so much. This is the best doctrine, though as we shall see there is some conflict.

In Iowa it has been held that the plaintiff must show that an assessment had been made, and its amount, in order to recover at law on a certificate promising the net amount of an assessment not exceeding \$3000. The dissent of J. Beck is clearly the better law.⁴ The true remedy, the court say later, is *mandamus* to compel an assessment.⁵ In Michigan, on the contrary, *mandamus* does not lie to compel a mutual company to levy an assessment and pay a loss. The proper method is to bring suit on the contract.⁶ On the other side stand New York, Minnesota, &c. A mutual certificate entitling a member to "the sum of one dollar for each contributing member, not exceeding \$2000," is an absolute agreement to pay an amount to be determined by the number of contributing members, and it is not necessary for the

¹ [Appeal of Susquehanna Ins. Co., 105 Pa. St. 615.]

² [Freeman v. National Ben. Soc., 42 Hun, 252.]

³ [Oriental Ins. Ass. v. Glancey, 70 Md. 101.]

⁴ [Bailey v. Mut. Ben. Ass., 71 Iowa, 689, 692.]

⁵ [Rainsbarger v. Union Mut. Aid Ass., 72 Iowa, 191; Newman v. Covenant Mut. Ben. Ass., 72 Iowa, 242.]

⁶ [Burland v. Mut. Ben. Ass., 47 Mich. 424; Bates v. Detroit Mut. Ben. Ass., id. 646.]

plaintiff to allege an assessment and prove how much was realized by it.¹ Neither is it necessary to ask equity to compel an assessment. A suit at law for damages for refusal to assess is the proper remedy, the measure of damages being the amount assessable on all insured, unless the defendant alleges and proves that it should be less.² In a suit against a mutual company the plaintiff should recover a money judgment. He is not obliged to proceed by *mandamus* to compel an assessment, but may give evidence of the amount that would be realized by the assessment, and have a verdict accordingly.³ If a mutual policy is written for eighty per cent of an assessment not exceeding \$4000, and the company refuses to assess, it is not necessary to bring a bill for specific performance. An action at law for substantial damages may be maintained, and when the allegations admitted by demurrer claim that eighty per cent of an assessment would realize \$4000, it seems the recovery may be for the whole sum.⁴ If however the policy provides that the company shall only be liable in a proceeding to compel an assessment, the only remedy is suit in chancery for specific performance.⁵ After a verdict and judgment against a mutual company, it is improper for the court to restrict the verdict and judgment to the assessments made or to be made by the company, as this puts the payment in the power of the company.⁶

Amount of Recovery. — Where it is shown that if the assessment had been made within the specified time the full amount of the policy would have been realized, the beneficiary is entitled to judgment for that amount.⁷ It has been said that there is no presumption that the assessments will amount to or exceed the sum named as the limit of insurance in the

¹ [Neskern v. Northwestern Endowment & Legacy Ass., 30 Minn. 408.]

² [Bentz v. Northwestern Aid Ass., 40 Minn. 203.]

³ [O'Brien v. Home Ben. Soc., 57 Hun. 495. See also Peck v. Eq. Acc. Ass., 82 Hun, 255. Darrow v. Family Fund Soc., 116 N. Y. 537.]

⁴ [Jackson v. Northwestern Mut. Rel. Ass., 73 Wis. 507, 511-513.]

⁵ [Eggleston v. Centennial Mut. Life Ins. Ass., 18 Fed. Rep. 14 (Mo.), 1883.]

⁶ [Seitzinger v. New Era Life Ass., 111 Pa. St. 557, 560.]

⁷ [Life Ass. v. Lemke, 40 Kans. 142.]

certificate. The burden is on the plaintiff to show that fact if it exists.¹ But other cases more justly hold that the burden is on the company to show how much less than the two thousand limit an assessment would raise.² In the absence of pleadings and proof that the sum should be reduced, the suit should be for the maximum amount.³ The numbering of the certificates is *prima facie* evidence of the membership of the society.⁴ A change in the by-laws may by diminishing the class from which the assessment is to be made reduce the amount recoverable on a policy already issued. The power to make by-laws is inherent and continuous, and the courts will interfere with the directors only when there is a manifest abuse of discretion.⁵ A member of a mutual company must take notice of its by-laws,⁶ and is bound by one which *requires* an appeal to a superior body of the order before suit in the courts.⁷ But the order cannot by constitution or by-law deprive a member of the right of final resort to the courts.⁸ Lack of a certificate of membership is fatal to a suit against a mutual company as a member.⁹ Where the amount of recovery is not limited by the amount of an assessment, an action may be maintained before any assessment is made, and a *mandamus* to compel an assessment may be had as auxiliary to the main action.¹⁰]

§ 564. **Liability of Directors for neglecting to assess, strictly construed.**—The insurance company, of which the appellees were directors, issued a policy to the appellant upon his barn, which was afterwards destroyed by fire. The company adjusted the loss and gave the appellant a note for one thousand

¹ [O'Brien v. Home Ben. Soc., 46 Hun, 426.]

² [Supreme Lodge, K. of P. v. Knight, 117 Ind. 489; Elkhart Mut. Aid, &c. Ass. v. Houghton, 103 Ind. 286; Protective Union v. Whitt, 36 Kans. 760.]

³ [Lueders v. Hartford Life, &c. Ins. Co., 11 Ins. L. J. 437 (Mo.), 1882.]

⁴ [Neskern v. Northwestern End. & Leg. Ass., 30 Minn. 407.]

⁵ [Supreme Lodge, K. of P. v. Knight, 117 Ind. 489.]

⁶ [Gray v. Supreme Lodge, K. of H., 118 Ind. 293; Holland v. Taylor, 111 Ind. 121.]

⁷ [Bauer v. Samson Lodge, K. of P., 102 Ind. 262.]

⁸ [Supreme Council, &c. v. Garrigus, 104 Ind. 133.]

⁹ [Bishop v. Empire Order of Mut. Aid, 43 Hun, 472.]

¹⁰ [Harl v. Pottawattamie County Mut. Fire Ins. Co., 74 Iowa, 39.]

dollars, the amount of the loss, and received from him a written receipt, discharging the company from all further claims on account of the fire. This note the company afterwards took up, paying part of the amount in cash, and giving a new note for the remainder, upon which the appellant afterwards brought suit and recovered a judgment. The directors failed to satisfy the execution issued upon the judgment, or to make an assessment. The statute touching insurance companies provided that "whenever sufficient goods or estate of any such corporation cannot be found to satisfy an execution issued against them upon a judgment recovered on a policy by them made, and the said corporation have goods or estate to satisfy such execution, and the directors shall neglect or refuse to pay the same; or if the directors shall for thirty days after the rendition of such judgment refuse or neglect to make such an assessment as they may be authorized to make therefor, and to deliver the same to the treasurer for collection, or fail to apply such assessment when collected toward satisfying such execution, then, in either of the cases aforesaid, the directors shall be personally liable for the whole amount of such execution." This being in the nature of a penal statute, inflicting upon the directors the penalty of a personal liability for a failure to pay the execution, or to make and properly apply the assessment, must therefore be construed with some degree of strictness, and cannot be extended beyond the cases fairly within its terms, in order to meet those that might be conceived to be within the spirit and object of the law. And where the legislature provides the personal remedy against the directors only in cases where there has been a judgment against the corporation on a policy, the court cannot extend the remedy to cases where a judgment has been recovered on something else than a policy.¹

¹ *Raber v. Jones*, Sup. Ct. Ind., 2 Ins. L. J. 519.

CHAPTER XXXII.

REMEDIES, EVIDENCE, PLEADING, INSOLVENCY.

ANALYSIS.

REMEDIES.

Insured against insurers.

§ 565. If the insurer refuses to deliver the policy in consequence of a fire, &c., the insured may sue in equity for specific performance or at law for damages, showing the contract by other evidence.

§§ 566-566 B. Where the insured wishes to defend against the plea of falsehood in the answers by showing that it is the *agent's fault*, he can in most States show the facts by parol and claim waiver or estoppel. Where this is not possible he may go into Equity and have the contract *reformed*, or get an *injunction* against the insurers setting up a fraudulent defence.

Reformation will be granted upon clear and convincing evidence that the actual policy, through mutual mistake, or mistake on one side and fraud on the other, differs from the agreement really made by the parties, unless the mistake was due to the negligence of the plaintiff, or he has been guilty of laches, or the action on the policy if reformed would be barred, or the assured has already sued at law and lost on the merits.

Equity will not aid one who rests for years on his policy, even though he had very imperfect knowledge of English. He should have sought the aid of others.

But if the policy is obscure the insured is not to blame for not reading it, and if the facts calling for relief can be made out clearly, the court will not put out the excuse of "laches" merely because the plaintiff did not read the policy. He has a right to presume it is all right.

There is no period short of the Statute of Limitations within which a man must discover error or fraud.

If suit is brought on the policy within the time limited, a bill for reformation may be brought after that time.

Equity will enjoin a suit at law after a bill has been dismissed, § 566.

Cases in which equity will reform, § 566 A.

Cases in which equity will not reform, § 566 B.

No fraud or mutual mistake. Parties did not know the facts at time of insurance, &c. Acceptance of

policy with knowledge of error. An intent to limit the right of a beneficiary (wife) uncommunicated to the company at the time of insurance is no ground for reformation. So where insured stated goods to be in building A. when they were in B. § 566 B.

§ 566 C.

Equity continued.

Bill for discovery.

Specific performance of agreement to insure.

Setting aside a judgment on the ground of new evidence.

Rescission, laches.

Cancellation not obtainable by one who has allowed another to take out a policy on his life, though without interest and hostile, there being no allegation of danger.

Relief against forfeiture not imposed by statute.

Interpleader.

Jurisdiction.

§ 567.

Recovery of premiums (with interest) may be had if the policy is void *ab initio*, or the risk never attaches, and there is no agreement to the contrary, and no fraud or violation of morals by the plaintiff. A mere mistaken misrepresentation will not prevent his recovery.

In general, if the risk attaches for a single moment on the *whole* property no part of the premium can be recovered, but it is otherwise if the policy becomes illegal by statute after its issue.

Excess of premium paid by creditor in mistake of the law for insurance beyond his debt may be recovered.

Agent's promises. Surrender. Premiums paid after forfeiture.

§ 568.

After war suit lies to compel recognition of policy, or repayment of premiums.

Compulsory renewal of policy.

§ 569.

Surrender of policy unfairly obtained.

Wrongful refusal to deliver or continue policy or receive premiums, or give a paid-up policy. Measure of damages.

§ 569 A.

Venue.

Action on policy transitory.

Stipulation limiting suits to home State void.

Foreign company may remove suits to United States courts.

§ 570.

Remedy of insured against directors.

§ 571.

Stockholders may sue to compel correction of dividend.

§ 572.

On forfeiture company may recover all premiums earned while the risk continued.

Equitable adjustment by directors after forfeiture.

Courts cannot interfere. Dividends. Profits.

Insurers against insured.

§ 573.

Recovery of policy obtained by fraud. Cancellation. Rescission. Injunction against suit at law on the policy.

§ 574.

Cancellation. Rescission.

- § 575. Payment on loss of more than there is a legal obligation to pay, under a mistake of *fact* pertaining to liability, may be recovered, though the *means* of knowledge were at hand, and even though the company had no right to do business.
- False representations of death.
- § 576. Agents against insurers. Commissions.
- § 577. Remedies by and against foreign insurance companies.
- Recovery of premiums by or from a company that has not conformed to the condition of doing business. Service of process, &c.
- Whether a policy issued by such company is void or not.
- § 578. Right of foreign company to remove action to United States courts.
- § 578 a. Retaliatory legislation. A company does business in another State only by comity, and any restrictions thought advisable may be put upon it, which it cannot overcome by the provisions of the policy. A law affecting foreign insurance companies may however be unconstitutional as violating the uniformity of taxation.

EVIDENCE.

- § 579. Burden of proof. Insurable interest. Title.
- Neutrality. Former transactions. Identity of premises. Misrepresentation of "life" in former transaction of his own cannot affect creditor's policy. Proofs as evidence.
- Application. Other similar occasions.
- Admissions of adjuster.
- Physician's privilege waived.
- Wrong admission of evidence not cured by telling jury to disregard it.
- § 579 A. Declarations of the "life" not admissible against the beneficiary unless part of *res gestæ*.
- § 579 B. Parol evidence of what passed at insurance.
- of error in policy, as to date or amount.
- of meaning of "epidemic."
- of meaning of "rags," "old metals." Usage.
- that assignment was as collateral.
- circular saying that thirty days grace would be given on premiums, inadmissible.
- §§ 580, 581. Expert testimony.
- § 582. Custom and usage. Particular custom must be known to insured.
- General custom, as to charge more on unoccupied houses, is admissible on question of increase of risk. So general custom to give thirty days grace on premiums.
- § 583. Wilful burning. A preponderance of evidence enough.
- Contra*, a few cases.
- Every circumstance that can throw light on motive is evidence. Plaintiff's good character admissible.
- § 584. Issue of policy. Signing application. Receipt of premium. Organization of company.
- § 585. Disease. Health. Death.
- § 586. Effect of misrepresentation a question of law.

§ 565] INSURANCE: FIRE, LIFE, ACCIDENT, ETC. [CH. XXXII.

§ 587. Suicide. Belief. Character. Fraud. Value of neighboring property.

§ 587 A. Variance.

§ 587 B. Court and Jury.

PLEADING, §§ 588-591 A.

§ 589. Policy must be set out, and application if part of the policy. Performance of conditions *precedent* to right of recovery must be alleged.

general allegation sufficient, but it must be stated that the period allowed the company for payment has expired.

must state that notice and proofs were furnished as agreed, or were waived.

Proof of waiver of a condition is admissible under the allegation of performance.

§ 590. Allegations as to interest, assignment, value, description of property, &c.

Plaintiff need not aver matters of defence, exceptions, conditions subsequent, the right of the company to do business, sufficiency of capital (§ 589), &c., nor that demand was made before suit.

§ 591. Matters in defence must be specially pleaded. Intentional injury. Arbitration. Breach of warranty.

Misrepresentation. Other insurance.

Objections different from those raised before suit will not do.

False swearing. Fraud.

§ 591 A. *Ultra vires*. See also § 577, and chap. iv.

§ 591 B. New Trial.

BANKRUPTCY AND INSOLVENCY.

§ 593. Conflict of laws. Assignment in domicil takes precedence of attachment in another State.

§ 593. Status of the company and powers of court.

§ 594. Powers and duties of assignees and receivers.

Interest that passes to the receiver.

Status of policy-holder.

§ 594 a. Distribution of assets. Priority of claims. The measure of a policy-holder's claim. Death after insolvency. Paid-up policies. Compensation of receiver.

§ 595. Set-off.

§ 596. Rule on this subject as affected by insolvency.

§ 597. Cessation of business. Selling out to another company.

§ 565. Insured against Insurer; Refusal to deliver Policy. —

It not unfrequently occurs that, the parties having come to an agreement upon the terms of the contract before the delivery of the policy, a fire or some other event intervenes, and the company refuses to deliver the policy or to admit its liability. In such case two courses are open to the insured. He may resort to a court of equity to compel the delivery of the

policy, when, in a proper case, the court, having jurisdiction to compel specific performance, will, to avoid circuity of action, decree payment for the loss, as if a policy had issued.¹ Or a suit at law will be sustained, upon competent and satisfactory evidence, whether verbal or written, to show the terms of the contract.²

§ 566. **Insured against Insurer; Reformation of Contract.** — Where the insured is likely to be met with the defence that there is falsehood in his answers contained in the application, and he would avail himself of the reply that he was misled by the insurers or their agent, he will carefully consider how he will seek his remedy. In some States the courts of law feel obliged, under the strict rules of evidence which govern such courts, to deny him the privilege of proving the facts, and so he will fail in his suit; while the same courts, perhaps, had their aid been invoked in equity, would have found some way in which the facts might have been available.³ In most of the States, however, courts of law will apply the doctrines of waiver and estoppel, or allow proof of mistake, so as to enable the plaintiff to maintain his action for indemnity, and not drive him to a court of equity.⁴ And where this is not permitted, a court of equity may be applied to reform the contract, if it does not conform to the agreement, as made by mistake of law or fact, or procured by fraud, so that an action at law can be maintained. And in this case, as in the case of a bill in equity to enforce specific performance by de-

¹ *Baile v. St. Joseph Ins. Co.* (Mo.), 10 Ins. L. J. 657, 663; *Rhodes v. Railway Passengers' Ins. Co.*, 5 Lans. (N. Y.) 71; *Union Mut. Ins. Co. v. Com. Mut. Mar. Ins. Co.*, 2 Curtis (C. Ct. U. S.), 524; s. c. affirmed, 19 How. (U. S.) 318; *Fried v. Royal Ins. Co.*, 50 N. Y. 243; *Franklin Fire Ins. Co. v. Hewitt*, 3 B. Mon. (Ky.) 231.

² *Perkins v. Washington Ins. Co.*, 4 Cow. 645; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 339; *Whittaker v. Farmers' Union Ins. Co.*, 29 Barb. (N. Y.) 312; *City of Davenport v. Peoria Mar. & Fire Ins. Co.*, 17 Iowa, 276; *Commercial Ins. Co. v. Hallock*, 3 Dutch. (N. J.) 645, affirming s. c. 2 id. 268; *Sussex County Mut. Ins. Co. v. Woodruff*, 2 id. 541; *Sheldon v. Conn. Mut. Life Ins. Co.*, 25 Conn. 207; *Gerrish v. German Ins. Co.*, 55 N. H. 355. And see also *ante*, § 23.

³ *Holmes et al. v. Charlestown Mut. Fire Ins. Co.*, 10 Met. (Mass.) 211; *Bartlett et al. v. Union Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 175.

⁴ *Wilson v. Conway Mut. Fire Ins. Co.*, 4 R. I. 141. And see *ante*, §§ 143, 144, 498 *et seq.*; *Gerrish v. German Ins. Co.*, 55 N. H. 355.

livery of the contract, the court having jurisdiction to reform, and for the same reason will decree damages.¹ Evidence showing that the insurer and insured meant to make a certain contract, but by misconception of the effect of the language used terms in the policy which defeated their intention, makes a proper case for its reformation.² The evidence, however, in such case must be clear.³ If there be substantial doubt as to what was the statement of the applicant, or as to the fairness of his claim to have been mistaken, or the agreement of the parties, or a material conflict of testimony, the court will not aid the plaintiff. The affirmative is upon him, and he must show what statement he made, and what the agreement was. The fact that the statement is not true, and the presumption that he would not make a false statement, the effect of which would be to invalidate the policy, are not enough. It must also appear that the mistake was mutual,⁴

¹ *Oliver v. Mut. Com. Mar. Ins. Co.*, 2 Curtis (C. Ct. U. S.), 277; *Phoenix Ins. Co. v. Hoffheimer*, 46 Miss. 645; *Collett v. Morrison*, 12 Eng. L. & Eq. 171; *Phoenix Insurance Co. v. Gurnee*, 1 Paige (N. Y.), 278; *Longhurst v. Star Ins. Co.*, 19 Iowa, 364; *Neville v. Merch. & Manuf. Ins. Co.*, 19 Ohio, 452; *New York Ice Co. v. North West Ins. Co.*, 23 N. Y. 357, reversing s. c. 10 Abb. Pr. (N. Y.) 341; *Stout v. Fire Ins. Co. of New Haven*, 12 Iowa, 371; *Perry v. Newcastle Dist. Mut. Fire Ins. Co.*, 8 U. C. (Q. B.) 363; *Harris v. Columbiana, &c. Ins. Co.* 18 Ohio, 116; *Hammel v. Queen Ins. Co.*, 50 Wis. 240.

² *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283.

³ [*Andrews v. Essex Fire & Mar. Ins. Co.*, 3 Mason, 6 at 10; *Bishop v. Clay Ins. Co.*, 49 Conn. 167. The proofs of mutual mistake in drawing up a policy must be very clear and convincing. *Blake-Opera House Co. v. Home Ins. Co.*, 73 Wis. 667; *Elstner v. Cincinnati Eq. Ins. Co.*, 1 Dis. (Ohio) 412 at 419. Evidence that the company knew the intention of the insured at the time of making the policy must be very clear, before the instrument will be made to conform to it. *Graves v. Boston Mar. Ins. Co.*, 2 Cr. (U. S.) 418 at 444. A petition for reformation of a policy must show by clear allegations that the petitioner expected a different protection from that afforded him, and that the company agreed to it, but that by mistake or fraud such was not incorporated in the policy. *Davega v. Crescent Mut. Ins. Co.*, 7 La. Ann. 228 at 229. It is not enough to show that the insured applied for a certain policy, P., and that the company issued one of different terms, P¹. it must also be shown that they *agreed* to issue P. or mutual mistake is not made out. *Durham v. Fire & Mar. Ins. Co.*, 22 Fed. Rep. 468; 10 Sawy. 526 (Oregon) 1884.]

⁴ [*McHugh v. Imperial Fire Ins. Co.*, 48 How. Pr. 230; *Balen v. Hanover Fire Ins. Co.*, 67 Mich. 179. Not merely from ignorance of the *law* and the real intended contract must be evident. *Kent v. Manchester*, 29 Barb. (N. Y.) 595 at

what was the contract, and that both parties have done what neither intended, or that it was the mistake of one party induced by the fraud of the other, and this by the same clear and distinct evidence, free from substantial doubt.¹ Or, again, a court of equity will, in a proper case, enjoin the insurers from setting up a defence which would be fraudulent or grossly inequitable and unjust.² But a court of equity will not entertain a bill to reform a policy, upon which a suit at law has been brought and failed. The insured, having elected to sue upon the policy as it was, must abide the result.³ Equity will also enjoin a suit at law brought after a bill in equity has been dismissed.⁴ Where the mistake is due to the negligence of the petitioner,⁵ or there has been laches in bringing the suit, it will not interfere.⁶ [If the insured ac-

597. A written instrument will be reformed on the ground of mistake, only when the correction asked for expresses the understanding of both parties at the time it was executed. *Ledyard v. Hartford Fire Ins. Co.*, 24 Wis. 496. If the mistake was not made by both parties, only rescission or cancellation will be ordered. *Diman v. Prov. &c. R. R. Co.*, 5 R. I. 130 at 137; *Kent v. Manchester*, 29 Barb. 595 at 597.]

¹ *Ibid.*; *Nat. Ins. Co. v. Crane*, 16 Md. 260; *Suydam v. Columbus Ins. Co.*, 18 Ohio, 459; *Cooper v. Farmers' Mut. Fire Ins. Co.*, 50 Pa. St. 299; *Tusson v. Atlantic Mut. Ins. Co.*, 40 Mo. 33; *Parsons v. Bignold*, 15 L. J. N. S. (Ch.) 379, per *Lyndhurst*, L. C.; *Van Tuyl v. Westchester Fire Ins. Co.*, 55 N. Y. 657; *Solms v. Rutgers Fire Ins. Co.*, 8 Bosw. (N. Y.) 578; *Moliere v. Penn. &c. Ins. Co.*, 5 Rawle (Pa.), 343; *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y. 240; *Snell v. Atlantic Fire Ins. Co.*, 98 U. S. 85; *Hay v. Star Fire Ins. Co.*, 13 Hun (N. Y.), 496; *Hearne v. Marine Ins. Co.*, 20 Wall. (U. S.) 488, 490; *Brugger v. State, &c. Ins. Co., C. Ct. (Oregon)*, 8 Ins. L. J. 293; *Patterson v. Ben Franklin Ins. Co.*, 81* Pa. St. 454; *Liverpool Ins. Co. v. Wyld*, 1 Canada Sup. Ct. Rep. 604; *Billington v. Provincial Ins. Co.*, 2 Ont. App. Rep. 158; *Fowler v. Scottish Eq. Ass.*, 28 L. J. (Ch.) 225; *Mead v. Westchester Fire Ins. Co.*, 64 N. Y. 453; *Continental Ins. Co. v. Jenkins (Ky.)*, 5 Ins. L. J. 514; *German, &c. Ins. Co. v. Davis (Mass.)*, 10 Ins. L. J. 670; [*Welles v. Yates*, 44 N. Y. 525 at 529; *Wyche v. Greene*, 11 Ga. 159, 169].

² *Woodbury Sav. Bank v. Charter Oak Ins. Co.*, 31 Conn. 518.

³ *Washburn v. Great Western Ins. Co.*, 114 Mass. 175; *Steinbach v. Relief Ins. Co.*, 12 Hun (N. Y.), 640. [But the dismissal of an action for damages, without determination on the merits, is no bar to a subsequent suit for reformation. *Spurr v. Home Ins. Co.*, 18 Ins. L. J. 619 (Minn.), May 1889.]

⁴ *Tredegar v. Windus*, L. R. 19 Eq. 607.

⁵ *Ryan v. World Life Ins. Co.*, 41 Conn. 168; *Taylor v. Charter Oak, &c. Ins. Co., C. C. P. (N. Y.)*, 10 Ins. L. J. 74; *Pindar v. Resolute Ins. Co.*, 47 N. Y. 114.

⁶ *Markey v. Mutual Benefit Ins. Co., C. Ct. (Mass.)*, 6 Ins. L. J. 537.

cepts and acts on the policy for years his laches will prevent his having it reformed to agree with his recollection of the terms of the contract.¹ A bill to reform, filed more than six years after knowledge of the ground on which liability is denied, cannot be maintained in equity although jurisdiction of the case is not conferred on the court until the six years had passed, and immediately before the filing of the bill.² If persons knowing themselves to have an imperfect knowledge of English, allow themselves to continue under an erroneous impression for years without effort to supplement their imperfect knowledge with the more perfect understanding of others, equity will not aid them, where there is no fraud.³ Where the insured thought by the representations of the agent that he was getting a ten year paid up policy, but in reality his policy was an ordinary one, after ten years' neglect to examine the policy, equity would not aid him against his own gross neglect.⁴ But where a policy-holder was induced to surrender it and take a new one upon false representations that the new policy was in its terms more favorable to him, laches were not to be imputed to him for not reading the instrument and discovering the fraud for five years, the new policy being so obscure that only insurance experts could understand it.⁵ And in opposition to the Georgia case where the plaintiff applied for a renewal on the same terms as the old policy, and the defendant promised to give it, and the plaintiff did not examine the new policy until after loss, when he found it different from the old one in a matter materially affecting his rights of recovery, it was held that he was not guilty of laches, having a right to presume the new policy to be like the old according to promise, and that the policy should be reformed.⁶ The length of time before the assured discovers the mistake in the policy is only important as evidence of the existence of such a mistake.

¹ [Zallée v. Conn. Mut. Life Ins. Co., 12 Mo. App. 111; Goldsmith v. Union Mut. Life Ins. Co., 2 How. Pr. n. s. 32. See however 18 Abb. U. C. 325.]

² [Dodge v. Essex Ins. Co., 12 Gray, 65 at 72.]

³ [Steines v. Manhattan Life Ins. Co., 34 Fed. Rep. 441 (Mo.), 1888.]

⁴ [Massey v. Cotton States Life Ins. Co., 70 Ga. 794.]

⁵ [Knauer v. Globe, &c. Ins. Co., 48 N. Y. Super. 454.]

⁶ [Palmer v. Hartford Ins. Co., 54 Conn. 488.]

There is no period short of the statute of limitations within which a man must discover such error.¹ A plaintiff is not, by neglecting to read his policy, guilty of such laches as to bar him from seeking to have the policy reformed to agree with the contract he made.² Where a suit on the policy has been brought within the period of limitation agreed on, a bill for reformation in aid thereof may be brought after the limit. Such a bill is not a suit on the policy.³ A bill to reform will not be entertained if action on the policy would be barred, even were it reformed.⁴]

[§ 566 A. **When Equity will Reform.** — An error in a policy may be corrected by the memorandum of the agreement or by the application marked “accepted” over the initials of an officer of the company.⁵ If by mistake of the agent a policy is issued in wrong form or with errors, equity will reform it even after a loss.⁶ A mistake brought about by wrong information given by the agent of the company, he being a lawyer, by which the policy was issued in the name of the mortgagor instead of the mortgagee, will ground a bill for reformation.⁷ Where the agent fails to state the interest that is intended to be insured, the policy will be reformed.⁸ If a policy differs from the memorandum, the policy will, by equity, be made agreeable to the memorandum.⁹ Where the policy omits the name of the insured, and states sixty days as the term of insurance instead of a year, as agreed upon by the parties in the verbal contract which the policy was intended to embody, the policy will be reformed. Upon “clear and convincing” evidence of mistake by one party and fraud by the other, or of mutual mistake so

¹ [Bidwell v. Astor Mut. Ins. Co., 16 N. Y. 264 at 266.]

² [Barnes v. Hekla Fire Ins. Co., 75 Iowa, 11.]

³ [Rosenbaum v. Council Bluffs Ins. Co., 37 Fed. Rep. 724 (Iowa), 1889.]

⁴ [Thompson v. Phoenix Ins. Co., 25 Fed. Rep. 296 (Oregon), 1885.]

⁵ [Lippincott v. Insurance Co., 3 La. 546 at 549; Wyld v. Union Mar. Ins. Co., 1 N. S. Eq. 203; Banks v. Wilson, id. 210; Equitable Ins. Co. v. Hearne, 20 Wall. 494 at 496.]

⁶ [Bailey v. Amer. Cent. Ins. Co., 13 Fed. Rep. 250, 286 (Iowa), 1882.]

⁷ [Sias v. Roger Williams Ins. Co., 8 Fed. Rep. 183 (N. H.), 1881.]

⁸ [Williams v. North Germ. Ins. Co., 24 Fed. Rep. 625 (Iowa), 1885.]

⁹ [Motteux v. London Ass. Co., 1 Atkins, 545 at 546; Delaware Ins. Co. v. Hogan, 2 Wash. 4, 6.]

that the writing does not carry out the intention of either, equity will reform.¹ When the insurer by mistake inserted the name of another vessel than the one intended to be insured, the policy was reformed after loss.² A policy issued in the wrong name, by mistake of the company's agent, may be rectified after loss, although the said agent signed the application with his own name for the applicant.³ When the insurer by mistake indorsed "eight boxes" &c., on the policy from a bill of lading given by the insured of a shipment, when in fact it was eighteen, which was not discovered until after loss, the policy was reformed. The rule that mistake must be mutual does not prevail where there is bad faith on the part of the defendant, or where confidence was reposed in him, and he was intrusted with and assumed the preparation or completion of the instrument, in which wilfully or negligently he has omitted what had been clearly stated to him as the intent of the plaintiff, who relies on the defendant in the matter.⁴ When the insurance company was told that no charter of the ship was at hand and the insured did not know just where she would touch, but wanted a policy for the round trip which would cover everything; and when the company purported to give such a policy, but in fact limited it in opposition to the charter, when found, equity ordered a reformation of the contract.⁵ When circumstances indicate that a policy was intended to be issued for two months, and the premium was paid for that time only, and the policy was written for a longer time, equity will reform the policy on the company's request.⁶ If a certificate for two thousand dollars is by mistake issued upon an agreement for a one thousand dollar policy, the company is entitled to have the document reformed.⁷

¹ [Devereux v. Sun Fire Office, 51 Hun, 147. The plaintiff did not discover the defects in the policy until after loss. See Avery v. Equitable Life Ass. Soc., 52 Hun, 392.]

² [Bates v. Grabham, 2 Salk. 444 at 444.]

³ [Hill v. Millville Mut. Mar. & Fire Ins. Co., 39 N. J. Eq. 66.]

⁴ [Brioso v. Pacific Mut. Ins. Co., 4 Daly, 246 at 250.]

⁵ [National Traders' Bank v. Ocean Ins. Co., 62 Me. 519 at 523.]

⁶ [North American Ins. Co. v. Whipple, 2 Biss. 418.]

⁷ [Gray v. Supreme Lodge K. of H., 118 Ind. 293.]

[§ 566 B. **When Equity will not Reform.**—A policy which does not state truly the interest of the assured cannot be reformed after loss, where the agents of the company and of the insured both testify that they did not know the true state of the title. The element of mistake necessary to ground the equity is absent.¹ D. applied to G. for a certain kind of policy he was unable to write in any of the companies he represented. G. applied to A., a friend in the insurance business, and A. wrote the policy in one of his companies. By mistake it did not read as A. and G. intended and agreed, and G. knew this fact but D. did not, and it was the very sort of policy he had applied for. After loss it was held that G. was not D.'s agent as to knowledge of the error, and that as D. had no actual knowledge of it, it was not a mutual mistake, and equity could not reform the contract.² "When an application for insurance does not attempt to set forth all the provisions which the policy shall contain, and the agent with or without authority represents that the policy will contain certain stipulations which are not unlawful, then the policy must contain them or the insured will not be obliged to accept it;"³ but if he elects to take it he cannot afterwards set up the omission when sued on his premium note. That a man has obtained a divorce from his wife is no ground for reforming a policy in which she is a beneficiary.⁴ If he intended that the funds should not go to her unless she continued to be his wife, but failed to communicate this intent to the company at the time of insurance, there is no mutual mistake.⁵ When the insured by mistake stated that the tobacco insured was in building A. when in fact it was in B., after a loss there could be no reformation of the policy.⁶ That would not be to correct the policy to the terms agreed on, but to make a new contract. The company never agreed to insure goods in building B.]

¹ [Farmville Ins. &c. Co. v. Butler, 55 Md. 233.]

² [St. Paul Fire & Mar. Ins. Co. v. Shaver, 76 Iowa, 282.]

³ [American Ins. Co. v. Neiberger, 74 Mo. 167 at 173.]

⁴ [Goldsmith v. Union Mut. Life Ins. Co., 2 How. Pr. n. s. 32.]

⁵ [Id. 17 Abb. N. C. 15. This case was however reversed on the ground that there was evidence of mutual mistake in the matter. See 18 Abb. N. C. 325.]

⁶ [Severance v. Continental Ins. Co., 5 Biss. 156 at 158.]

[§ 566 C. **Other Matters in Equity.** — A bill for discovery will lie to compel the insured to answer interrogatories, material in enabling the court to determine the question of misrepresentation.¹ It is not necessary in a bill for discovery to allege that the complainant is not able to prove his case at law without it. He is entitled to discovery of evidence to attack and to rebut his adversary.² Equity may enforce an agreement to insure, and compel the execution of the policy, and if loss has occurred, order payment therefor.³ Equity having taken jurisdiction to enforce delivery of a policy, will, if there has been a loss, retain it to decree payment on the policy.⁴ There must be conclusive proof that a contract of insurance was made in order to compel a company to issue a policy.⁵ Equity will not usually relieve on account of mere cumulative evidence, but where the defence was originally imperfect for want of distinct proof, a judgment on a policy may be set aside on the ground of newly discovered fraud sufficient for a perfect defence.⁶ A. gave a note for the premium, and the policy was delivered to him in May. A month after he discovered on looking at the policy that it was invalid through an act of the agent, and when payment of the note was demanded in August he refused to pay saying the policy was “no good.” In November suit was brought on the note, and not until the *next* November did the insured offer to rescind, which was held not to be within a reasonable time.⁷ Where the insured relies on his policy for fifteen years, and does not use the means at hand of testing the representations of the agent as to the profits of the company being sufficient to protect policy-holders against liability for loans, he cannot go into equity and claim a rescission.⁸ One upon whose life another has taken out a policy with his consent, cannot com-

¹ [Union Mutual Life Ins. Co., v. Gilbert, 25 N. B. R. 221.]

² [Atlantic Ins. Co. v. Lunar, 1 Sand. Ch. 91.]

³ [Carpenter v. Mutual Safety Ins. Co., 4 Sandf. Ch. (N. Y.), 408 at 410.]

⁴ [Hebert v. Mut. Life Ins. Co., 12 Fed. Rep. 807; 8 Sawy. 198 (Oregon), 1882.]

⁵ [McCann v. Aetna Ins. Co., 3 Neb. 198 at 206.]

⁶ [Ocean Ins. Co. v. Fields, 2 Story, 59 at 77.]

⁷ [Plympton v. Dunn, 148 Mass. 523.]

⁸ [MacIntyre v. Cotton States Life Ins. Co., 82 Ga. 478, 499.]

pel its cancellation, on the ground that the beneficiary has no insurable interest and is hostile to him, there being no allegation of danger, although he offer to reimburse the premiums.¹ Equity will not relieve against a forfeiture imposed by statute.² If a policy on the life of A., payable to B., is surrendered without B.'s consent and a new policy issued payable to C., the company cannot maintain a bill of interpleader against B. and C., for it may be liable to each.³ Although gross fraud, misrepresentation, and concealment in procuring a policy were charged, the court of equity in South Carolina held that it had no jurisdiction.⁴

§ 567. **Recovery back of Premium.** — If a policy be void *ab initio*, or if the risk never attaches, and there is no actual fraud on the part of the insured, and the contract is not against law or good morals, though there may have been misrepresentation or breach of warranty, he may recover back all the premiums he may have paid, either in an action for them alone, or on a count for money had and received, coupled with a count on the policy in an action for the loss.⁵ So, if he has

¹ [Peckham v. Grindlay, 17 Abb. N. C. 18.]

² [Winchell v. Hancock Mut. Life Ins. Co., 8 Rep'r 549, 1st Cir. (Mass.) 1879.]

³ [National Life Ins. Co. v. Pingrey, 141 Mass. 411.]

⁴ [Charleston Ins. Co. v. Potter, 3 Des. (S. C.) 6 at 7-8.]

⁵ Clark v. Manufacturers' Ins. Co., 2 Woodb. & Minot (C. Ct. U. S.), 472; Mutual Ass. Co. v. Mahon, 5 Call (Va.), 517; Tyrie v. Fletcher, Cowp. 666, 668; Fowler v. Scottish Eq. Life Ins. Co., 28 L. J. Ch. 225; Rochester Ins. Co. v. Martin, 13 Minn. 59; Foster v. U. S. Ins. Co., 11 Pick. (Mass.) 85; Mulvey v. Gore Ins. Co., 25 U. C. (Q. B.) 424; Delavigne v. U. S. Ins. Co., 1 Johns. (Ch.) 310. [Where the contract is not immoral or contrary to law, the assured may in the absence of express agreement to the contrary, recover his premiums where the risk has not commenced or the contract is void *ab initio*. Aetna Life Ins. Co. v. Paul, 10 Brad. 431; Anderson v. Thornton, 8 Exch. 425 at 427. By reason of a misrepresentation not fraudulent, for example. Feise v. Parknison, 4 Taunt. 640 at 642; Insurance Co. v. Pyle, 44 Ohio St. 19. Where a mortgagee obtained insurance, the policy being conditioned to be void if the interest of the assured when other than the sole ownership was not expressed, it was held that, the policy being void *ab initio* and there being no fraud on the part of the insured, he could recover his premiums. Waller v. Northern Ass. Co., 64 Iowa, 101; Penson v. Lee, 2 B. & P. 330 at 333. And he may have interest on his money for the time the insurers have had the use of the same. Waddington v. Insurance Co., 17 Johns. 23 at 24. When a ship illegally sailed four days

been induced to accept a policy by false representations.¹ So where the premium is applicable to two risks, and one never attaches, the premium paid on the latter, if ascertainable, may be recovered back.² So if the insured, after alienation, has the option to surrender his policy and take up his deposit note, he may recover back so much of the premiums paid as may not be required for the payment of losses up to the time of the surrender.³ So he may recover back premiums paid on a policy improperly cancelled, or a sum sufficient to procure new insurance at the former rate.⁴ And such, doubtless, would be the case where premiums are paid after forfeiture of the policy, in the belief that the forfeiture has been waived.⁵ But if the policy be obtained by means of fraudulent misrepresentation, for that reason, though the risk never attaches, the premium cannot be recovered back.⁶ So if the policy be an illegal contract, neither party can have any remedy in the courts against the other.⁷ But if the risk once attaches, the premium is not apportionable.⁸ [There is in general no return of premium where the policy attaches, though it be but for a

before the proper license was issued, it was held that the policy was void but that the premium must be returned. *Hentig v. Staniforth*, 5 M. & S. 122 at 124. When the company acknowledges in the policy the receipt of the premium, the unearned portion of it may be recovered in an action for money had and received, even when it was paid by a promissory note and the note has not been paid. *Hemmenway v. Bradford*, 14 Mass. 121 at 122.]

¹ *Martin v. Aetna Life Ins. Co.* (Tenn.), 4 Ins. L. J. 899; *Boland v. Whitman*, 33 Ind. 64; *United States Life Ins. Co. v. Wright* (Ohio), 8 Ins. L. J. 169.

² *Bunyon*, Insurance, 95.

³ *Sullivan v. Massachusetts Mut. Fire Ins. Co.*, 2 Mass. 318.

⁴ *Braswell v. American Ins. Co.*, 75 N. C. 8.

⁵ *McKee v. Phoenix Ins. Co.*, 28 Mo. 383.

⁶ *Friesmouth v. Agawam Mut. Ins. Co.*, 10 Cush. (Mass.) 587; *Hoyt v. Gilman*, 8 Mass. 336. [But upon a mere *misrepresentation* without actual fraud where the risk never attached the premiums may be recovered. *Feise v. Park-nison*, 4 Taunt. 640 at 641.]

⁷ *Browning v. Morris*, Cowp. 790; *Andree v. Fletcher*, 2 T. R. 161; *Howson v. Hancock*, 8 T. R. 575; *Russell v. De Grand*, 15 Mass. 35; *Campbell v. Allan*, 9 Mor. Dec. (Scotch), Appendix, Ins. 13. [The courts will not interfere to give a return of premium on an illegal policy except in cases of oppression. *Lowry v. Bourdieu*, 2 Doug. 468 at 470.]

⁸ *Bermon v. Woodbridge*, Doug. 781; *Fulton v. Lancaster Ins. Co.*, 7 Ohio 325; *Merchants' Ins. Co. v. Clapp*, 11 Pick. (Mass.) 56.

single moment.¹ But the rule that if the risk attaches the right to the premium is indefeasible is not without exceptions. If a policy is legal when made but becomes subsequently illegal by statute, both parties are discharged; the insured loses his indemnity, and the insurer his premium.² A. chartered a ship to sail to the Spanish Main and bring back a cargo of wines, and insured the profits of said cargo, no other evidence of interest to be required than the policy, and if the goods did not arrive he was to recover for a total loss; the ship did not take the cargo, and it was held that the premium could not be recovered since the insurers had taken the risk of the return of the ship. If she had not returned the company would by the policy have had to pay whether there were any goods on board or not, for the agreement was that no other proof of interest should be required than the policy. It was a wager contract.³ In a Pennsylvania case an unjust rule was applied, the company being compelled to return the premiums without any allowance for carrying the risk during the life of the contract, the court saying that as there had been no loss the insured had received no substantial benefit from the contract.⁴ That seems queer reasoning. If the carrying of a risk is no substantial benefit, why do so many men pay so much money to some one to render them that imaginary service? The rule gives the assured the cost of obtaining a new policy as good as the old one. Where a policy was issued without examination of the insured by a physician and afterward taken up by the company for that cause, and the beneficiary who was without fault and had paid in good faith a number of premiums was promised by the agent that he should have the policy all right, or his money, the company is liable in *assumpsit*.⁵ The promise of an agent of a company at the time of the delivery of the policy, which was objected to on certain grounds, but accepted and acted upon

¹ [Waters v. Allen, 5 Hill, N. Y. 421 at 424; Moses v. Pratt, 4 Camp. 297 at 298.]

² [Gray v. Sims, 3 Wash. C. C. 276 at 280.]

³ [Juhll v. Delonguemere, 2 Johns. Cas. N. Y. 333 at 334.]

⁴ [American Life Ins. Co. v. McAden, 109 Pa. St. 399.]

⁵ [Frain v. Life Ins. Co., 67 Mich. 527.]

by the payment of premiums, that the company would make it all right, will not authorize a subsequent disaffirmance of the contract and recovery back of the premium by the insured.¹ But in such case the insured may compel the execution and delivery of a valid policy.²

In *Leonard v. Washburn*,³ an agent of a foreign insurance company took the acceptance of the applicant for the premium to be paid, and agreed to procure and deliver a policy, which he accordingly did, in the usual form of policies issued by the office. The terms of the policy proving objectionable to the applicant, a modification was obtained, but, being still unsatisfactory, the applicant refused to accept it, and demanded a return of his acceptance. But this had been negotiated, and the proceeds forwarded to the company on the receipt of the policy. The acts of the agent were in contravention of his instructions as to the receipt of the premium; but the policy had been issued under such circumstances that it would be valid. The applicant paid his acceptance at maturity, and then brought suit against the agent to recover the amount. But it was held that as the agent had done all he had agreed to do, and the policy actually issued was a valid one, the action could not be sustained.

Where the premium covers an illegal excess of insurance, as where a creditor insures the life of his debtor for more than the amount of his debt, both parties being under mistake of the law, the proportional excess of premium may be recovered back by the insured.⁴

§ 568. **Insured against Insurer; Suit to revive Policy declared forfeited, or to recover back Premiums paid.** — *Cohen v. New York Mutual Life Insurance Company*⁵ presented the

¹ *Mecke v. Life Ins. Co. of New York*, 8 Phila. Rep. 6.

² *Perry v. Newcastle Dist. Mut. Fire Ins. Co.*, 8 U. C. (Q. B.) 363. And see also *ante*, § 544.

³ 100 Mass. 251. See also *Perry v. Newcastle, &c. Ins. Co.*, 8 U. C. (Q. B.) 363.

⁴ *London, &c. Ins. Co. v. Lapierre*, 1 Legal News, 506.

⁵ 50 N. Y. 610, overruling the same case cited *ante*, § 41, upon the point that the failure to pay the premiums as they fell due worked a forfeiture. 2 Ins. L. J. 426. This case must also be considered as overruling *O'Reiley v. Mutual*

case of an insured, who, on the breaking out of the war, was compelled thereby to suspend the payment of the annual premiums as required by the policy, but on the termination of the war tendered the whole amount due. The insurers refusing to accept, the insured brought suit to compel acceptance and to have the policy declared valid, or to compel the return of premiums theretofore paid. The court upheld the action against the objections of the defence. "The defendant also objects," said the court, by Allen, J., "to the right of the plaintiff to maintain an action at this time, there having been no loss, and therefore no cause of action under the policy. The allegations of the complaint are, that the plaintiff has tendered the premiums due, and that the defendant refused them, and declared the said policy cancelled and forfeited. This is a peculiar case, and there are many reasons, unless there is some rigid rule forbidding the court to entertain jurisdiction, why it should determine the matters in controversy at this time. 1. There is an actual controversy existing, and the only parties to it are before the court. There is not the reason for declining jurisdiction that presented itself in some of the cases cited by the defendant, as in *Grove v. Bastard*,¹

Life Ins. Co., 2 Abb. Pr. N. S. (N. Y. Superior Ct.) 167. See also *Hancock v. New York Life Ins. Co.*, U. S. C. Ct., East. Dist. Va., 2 Ins. L. J. 903, in which a similar action was upheld on a policy for \$5000, payable at the death of the insured, and where the rule of damages was said to be the amount of the policy less the amount of premiums unpaid, and less also such a number of annual premiums as the plaintiff's chance of life would probably require him to pay. If he has suffered such a change in health that his life is not reinsurable, he may recover full damages exceeding the amount of premiums paid, but not exceeding the amount insured. *Union Central Ins. Co. v. Poettker* (Superior Ct. Cincinnati), 5 Big. Life & Acc. Ins. Cas. 449. In *Holdich's Case*, L. R. 14 Eq. 72, the value of a current policy was held to be the sum which would buy a similar policy in a safe office. 3 Big. Life & Acc. Ins. Cas. 272. The insured has the right to sue in his own name an insurance company which has assumed the liabilities of the company in which he is insured, the latter having transferred its assets and liabilities to it. *Fischer v. Hope Ins. Co.*, 69 N. Y. 161. See also *Fletcher v. Aetna Ins. Co.*, Superior Court, Montreal, 4 Ins. L. J. 236, where fraud in obtaining the policy was successfully set up in defence to an action to recover it. A like defence will be effectual to an action to recover back premiums paid. *Trabandt v. Conn. Mut. Life Ins. Co.* (Mass.), not yet reported; *Lewis v. Phoenix Ins. Co.*, 39 Conn. 100.

¹ 2 Ph. (Eng. Ch. 22), 619.

that all the parties in interest could not be heard and their rights determined. 2. Present rights under the policy, and incident to it, are denied the plaintiff. Her policy having been declared forfeited and cancelled, she is excluded from the privileges and denied the rights which belong to her as a member of the company. She is entitled, unless the claim of the defendant is well grounded, at once and at all times to the privileges of other policy-holders, and to be recognized as such. 3. The plaintiff is entitled, if the right to pay the premiums and continue the policy still exists, to pay the arrearages and stop the accruing of interest, and to make the future payments as they accrue and become due, without interest, and relieve herself as well of the risk and burden of retaining the money which of right belongs to the defendant. 4. The contract of insurance where the policy is to be kept alive by periodical payments is peculiar; and the duty to pay, and obligation to receive, are mutual. It is somewhat different from a simple obligation to pay money, a tender to perform which would bar an action upon it. So, too, a receipt or acknowledgment of the payment is customarily given, and is as essential as evidence of the continuance of the contract as is the original policy. The policy-holder is entitled to some evidence of the performance of the condition on his part, if, as is believed, the universal usage is for the insurers to certify in some way the fact that the annual premiums are paid. 5. It is fit and proper that both parties to the contract should know their rights. Especially is it important to the plaintiff and the insured that if this policy is avoided they may seek insurance elsewhere, and if valid, that they may perform the conditions of the policy. In ordinary cases courts will not, in advance of any present duty, obligation, or default, declare the rights and obligations of suitors; they will do it where peculiar circumstances render it necessary to the preservation of right. It was done in *Baylies v. Payson*.¹ In *McKee v. Phoenix Insurance Company*,² where a wife insured the life of her husband, and, after making several payments, obtained a divorce, but continued to pay the annual premiums after the

¹ 5 Allen, 473.

² 28 Mo. 383.

divorce, until the company refused to receive them, on the ground that she no longer had an insurable interest, it was held that the refusal was wrongful, and the insured might, if she chose, treat the contract as at an end, and recover back all the premiums she had paid. In *Girdlestone v. North British Mercantile Insurance Company*,¹ a bill was brought to compel the insurers to reinstate the insured, in a policy which the insurers claimed had lapsed by the failure of the insured to pay his premium. And the court, in aid of the bill, ordered the defendants to answer certain interrogatories relative to the plaintiff's case.

§ 569. **Same Subject.** — So equity will compel the renewal of a policy the surrender of which has been obtained unfairly,² as well as the surrender of a policy so obtained,³ or a suit may be brought for damages for breach of the contract to continue the policy according to its terms,⁴ as where one company turns over its policies to another, and suspends business.⁵ The declaration by an insurance company that a life policy was void (on the ground that the insured had become of in-

¹ 11 L. R. (Eq.) 197; *ante*, § 356.

² *Tabor v. Mich. Mut. Life Ins. Co. (Mich.)*, 10 Ins. L. J. 97.

³ *Fletcher v. Aetna Life Ins. Co. (Superior Ct., Montreal)*, 4 Ins. L. J. 236.

⁴ [If no proper grounds exist for the refusal to continue the insurance, the insured may recover all money he has paid under the policy. *Aetna Life Ins. Co. v. Paul*, 10 Brad. 431. The measure of damages is the amount of premiums paid with interest on each from the time of its payment. *Ala. Gold Life Ins. Co. v. Garmany*, 74 Ga. 51. But in New York it is held that the measure of damages for the refusal to continue a valid policy is not the amount of premiums paid with interest, but the difference between the present value of the premiums the insured would have to pay on the policy during the life of the subject, and the present value of what he would have to pay to secure equally good insurance elsewhere, and if the life-subject is not insurable the measure of damages is the value of the policy at the time of the breach. *Speer v. Phoenix Mut. Life Ins. Co.*, 36 Hun, 322. If the company fail to deliver the policy as agreed, the premium may be recovered, although the parol contract binds them and the plaintiff is really insured. *Collier v. Bedell*, 39 Hun, 238. But where the risk attaches premiums paid cannot be recovered: *Continental Life Ins. Co. v. Houser*, 111 Ind. 266, although the company afterwards wrongfully refuses a paid-up policy. *Standley v. Northwestern Mut. Life Ins. Co.*, 95 Ind. 254, 258. The remedy is specific performance or suit for the value of the policy.]

⁵ *Fischer v. Hope Mut. Ins. Co.*, 69 N. Y. 161.

temperate habits), and a refusal to receive further premiums, does not make the policy presently payable. The policyholder has a threefold remedy: 1. To treat the policy as rescinded, and sue for its present value. 2. To continue to tender premiums, and, on the death of the insured, sue for the sum insured. 3. To go into equity, and ask to have the policy decreed in force.¹

[§ 569 A. **Venue.** — An action on a policy of insurance is transitory and may be brought wherever the company can be found, regardless of the location of the property or the place where the agreement was made.² A stipulation in a policy of a foreign insurance company that suits on it should only be brought in the State in which the company was incorporated, is void, as against public policy, and in violation of the statutes of Missouri.³ An insurance company doing business in one State but organized and having its principal office in another, is entitled, on being sued in the former, to have the cause transferred to the United States Circuit Court.⁴]

§ 570. **Insured against Directors; Premiums; Loss.** — Directors and others making or permitting false statements as to the condition and assets of an insurance company, whereby a party is induced to insure in a worthless company, are personally liable to him in an action at law for the deceit,⁵ although no actual damage has been sustained beyond the payment of the premiums.⁶ [Directors of a stock company who fraudulently hold out to the public the promise of certain dividends,

¹ *Day v. Connecticut General Life Ins. Co.*, 45 Conn. 480.

² [*Mohr, &c. Distilling Co. v. Insurance Cos.*, 12 Fed. Rep. 474; 11 Ins. L. J. 546; 14 Repr. 109, 6th Cir. (Ohio), 1882.]

³ [*Richard v. Manhattan Life Ins. Co.*, 31 Mo. 518 at 528.]

⁴ [*Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149 at 154; *Holden v. Putnam Fire Ins. Co.*, 46 N. Y. 1 at 4; *Hobbs v. Manhattan Ins. Co.*, 56 Me. 417, if all the members of the company are citizens of the charter state and it is a legal presumption that they are so. *Knorr v. Home Ins. Co. of New York*, 25 Wis. 143 at 149, a suit by or against a corporation is a suit against a city of the State under whose laws the company is organized, citing *Ohio, &c. Ry. v. Wheeler*, 1 Black, 286.]

⁵ *Salmon v. Richardson*, 30 Conn. 360.

⁶ *Pontifex v. Bignold*, 3 M. & G. 42; *Tebbetts v. Hamilton Mut. Ins. Co.*, 3 Allen (Mass.), 569.

are personally liable on the failure of such guaranty.^{1]} And so, perhaps, is the secretary of a company who assures the applicant that he may "hold himself insured," when in fact the negotiations have not arrived at such a stage as to make a binding contract, the applicant thereby losing all benefit of insurance by reliance upon the statement of the secretary.² Where directors are made liable if they do not promptly assess to pay losses, the liability will be strictly construed. And if a loss be settled by the company by giving its note, a failure to assess to pay the note is not within the liability.³

§ 571. **Mutual Insurance ; Dividend.** — Where a dividend which has been made proves to be incorrectly computed, the company may be compelled, at the suit of a stockholder, to readjust and correct the same.⁴

§ 572. **Forfeiture ; Equitable Adjustment ; Dividend ; Profits.** — [The insurer may on forfeiture of the policy recover all premiums earned while he carried the risk.^{5]} Where a policy becomes forfeited by violation of its terms, a clause providing that in such case "the party interested shall have the benefit of such equitable adjustment as may from time to time be provided by the board of directors," does not give the courts the right to compel an adjustment, unless, perhaps, the directors, having established general rules upon the subject, might be held to abide by these rules in the particular case.⁶ A provision of a charter of a mutual insurance company, that if the holder of certificates of proportionate premiums shall not, within five years of the publication of notice that they will be redeemed, present them for payment, they shall be cancelled on the books of the company, is not a forfeiture against which equity will relieve, but a limitation which bars a claim after the lapse of the time, whether the cancellation

¹ [Gerhard v. Bates, 2 E. & B. 476.]

² Christie v. North Brit. Ins. Co., 3 Ct. of Sess. Cas. (Scotch), 519.

³ *Anté*, § 564.

⁴ Luling v. Atlantic Mut. Ins. Co., 45 Barb. (N. Y.) 510.

⁵ [Hibernia Ins. Co. v. Blanks, 35 La. Ann. 1175.]

⁶ Nightingale v. State Mut. Life Ins. Co. of Worcester, 5 R. I. 38. Is not the failure to establish rules negligence which they cannot set up to defeat the rights of others?

on the books be made or not.¹ But where the policy has been suffered to lapse, the holder cannot claim dividends which before the lapse he might have appropriated, either in reduction of premium or in the purchase of additional insurance.² And such profits as may be due, though not declared, may be recovered in a suit for the loss.³

§ 573. **Insurers against Insured; Policy obtained by Fraud.** — Equity will also interfere to compel the surrender of a policy wrongfully obtained or delivered under a mistake of the facts induced by the misrepresentation or concealment of the assured. So it was decreed in a recent case,⁴ even when the policy had been assigned for value, without notice of the concealment. The insured had made his proposal, which, after the usual examination, was accepted, and he was duly notified of the acceptance. He was at the same time notified that until payment of the premium the company incurred no risk, and that any alteration in the mean time in his health would render the policy invalid, unless disclosed to the insurers before the actual receipt of the premium. After this notice, and before payment of the premium, the insured was told by a special physician, whom he travelled a considerable distance to consult, that he was dangerously ill, his ordinary medical attendant, however, advising him that he considered the appearances upon which the physician first consulted predicated his opinion, as of a temporary character only. After all these facts had transpired, the assured forwarded his check for the amount of the premium, making no mention of the facts about his health, but leaving this question to stand upon his original answers that he was well, and had always been well, and could not recollect that he ever had any illness, and received his policy. But the court, in a bill in equity, brought by the insurers against the assignee to compel him to deliver up to them the policy, decreed for the

¹ *Lang v. Delaware Mut., &c. Ins. Co. (Pa.)*, 10 Ins. L. J. 226.

² *Forrester v. Mut. Life Ins. Co. (Baltimore City Ct.)*, 4 Ins. L. J. 79.

³ *Schlect v. World Ins. Co. (N. Y. Sup. Ct., 1875, not reported)*. See also *post*, § 694; *Belcher v. International, &c. Ins. Co., Cochran (Nova Scotia)*, 35.

⁴ *The British Eq. Ass. Co. v. The Great Western Railway Co.*, 20 L. T. N. S. 422.

complainant, on the ground that the policy was void, both because of the suppression of the facts transpiring after notice of the acceptance of the proposal, and because the answers contained in the policy, as to the health of the insured, were not true, as of the date when the premium was paid and the policy issued.¹ If a policy of insurance be obtained by fraud, and with the intent to defraud, which gives an apparent cause of action to the holder against the company, the court, on a bill in equity, may order the policy to be delivered up and cancelled;² or restrain by an injunction an action at law on the policy;³ but some courts will not interfere, especially after a loss, where the fraud may be set up in defence at law.⁴ And the party seeking to rescind must offer to return all he has received under the contract.⁵

Under such a bill in equity to cancel, a loss may be set up as a counter-claim, and if the plaintiff fail, the defendant may recover on his counter-claim.⁶

§ 574. **Right to cancel Policy strictly construed.**—This right can only be exercised within the limits of good faith. A substantial change in the circumstances increasing the risk is the usual and sufficient ground on the part of the insurers. But they cannot avail themselves of such a right in the face of a fire actually threatening the destruction of the property insured; because, if this could be done, a policy of insurance

¹ This was in affirmation of the judgment of Malins, V. C., in the same case, 19 Law Times, n. s. 476; *Equitable Life Ins. Co. v. Patterson*, C. Ct. (Mass.), 10 Ins. L. J. 384; *London Assurance v. Mansel*, L. R. 11 Ch. D. 363. Upon the question of jurisdiction the following cases were cited: *Slim v. Croucher*, 1 De G., F. & J. 518; *Jones v. The Provincial Ins. Co.*, 3 C. B. n. s. 65; *Fowkes v. The Manchester & London Life Assur. Ass.*, 3 Best & Sm. 917; *Trail v. Baring*, 4 Giff. 485; *Thornton v. Knight*, 16 Sim. 509; *The Prince of Wales Ass. Co. v. Palmer*, 25 Beav. 605.

² *Commercial Ins. Co. v. McLoon*, 14 Allen (Mass.), 351; *French v. Connelly*, 2 Anstruther, 454; *Imperial Ins. Co. v. Gunning*, 81 Ill. 236.

³ *National Life Ins. Co. v. Egan*, 20 U. C. (Ch.) 469.

⁴ *Phoenix Ins. Co. v. Bailey*, 13 Wall. (U. S.) 616; *New York, &c. Ins. Co. v. Bangs* (U. S.), 12 Repr. 1; *Home Ins. Co. v. Stanchfield*, C. Ct. (Minn.), 2 Abb. C. C. 6; *Hoare v. Bremridge*, L. R. 8 Ch. App. 22; *Globe Ins. Co. v. Reals*, 50 How. Pr. Rep. 237.

⁵ *Harris v. Equitable Life Ins. Co.*, 64 N. Y. 196.

⁶ *Revere Fire Ins. Co. v. Chamberlin* (Iowa), 10 Ins. L. J. 397.

would be in many cases worthless, since it would be possible, in every case where fire approaches from without, to give notice of cancellation, and thus escape all risk under the policy.¹ And the right can only be exercised by a strict compliance with the terms and conditions upon which it is admissible.² If refunding the premium, or a portion of it, be one of the terms, there must be a payment or tender. An agreement with the insured that he shall return the policy to be cancelled, and receive his premium, is no cancellation.³ But if the agreement be that upon alienation the policy shall be returned for cancellation, and a ratable proportion of the premium shall be returned, the policy becomes void by the alienation, and the premium is only to be paid on its return.⁴ The right to rescind depends upon placing, or the offer to place, the insured *in statu quo*.⁵

§ 575. **Loss paid or received by Mistake.** — If a loss be paid under a mistake of facts pertaining to the loss, as distinguished from facts inducing the contract, which, if known to the insurers, would have enabled them to successfully resist the claim, they may recover back the amount so paid on redelivery of the policy.⁶ In *Columbus Insurance Company v. Walsh*,⁷ where a loss had been paid in ignorance of the fact that the policy had become void by subsequent insurance, obtained without assent, and contrary to the provisions of the policy, the insurers were allowed to recover it back. And it has been said that this is so whether the company so paying

¹ *Home Ins. Co. v. Heck*, 65 Ill. 111.

² *Runkle v. Citizens' Ins. Co. (C. Ct., Ohio)*, 11 Repr. 599; *ante*, §§ 67-69; *Chase v. Phoenix, &c. Ins. Co.*, 67 Me. 85.

³ *Hathorn v. Germania Ins. Co.*, 55 Barb. (N. Y.) 28.

⁴ *Buchanan v. Westchester Ins. Co.*, 61 N. Y. 611.

⁵ *Peoria Fire & Mar. Ins. Co. v. Botto*, 47 Ill. 516. See also *Grace v. American, &c. Ins. Co. (C. Ct. N. Y.)*, 8 Ins. L. J. 731; *International Ins. Co. v. Franklin Ins. Co.*, 66 N. Y. 119.

⁶ *Mut. Life Ins. Co. v. Wager*, 27 Barb. (N. Y.) 354; *Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass. 221; *North Western Ins. Co. v. Elliott*, C. Ct. (Oregon), 10 Ins. L. J. 333; *North British, &c. Ins. Co. v. Stewart*, 9 Ct. of Sess. Cas., 3d series, 534; s. c. 3 Big. Life & Acc. Ins. Cas., 510; *Berkshire Mut. Fire Ins. Co. v. Sturgis*, 13 Gray (Mass.), 177; *McConnell v. Delaware Ins. Co.*, 18 Ill. 228; *ante*, § 442.

⁷ 18 Mo. 229.

has the means of knowing the facts or not.¹ [If payment of a policy is made with a knowledge by the company that a defence is open to them, they cannot recover the amount back. There must have been a belief in fact which turned out to be untrue. If the company paid because it feared the effect that resisting the claim would have on its reputation, it cannot afterward change its mind, and without showing fraud or mistake of fact, recover the money.² It makes no difference, however, that the directors of the company *ought* to have known that the policy was lapsed and void. It is no defence in such an action to show that care would have discovered the truth.³] But insurers cannot be permitted, in the absence of fraud upon them, to reopen and try a case, upon a ground which might have been presented and tried when the claim was made under the policy for the loss; as, for instance, that the policy was void for misrepresentation, of which they were aware at the time of payment of the loss, or might have been upon due inquiry.⁴ Nor can the insured, who has adjusted his claim disadvantageously, under pressure not amounting to fraud, maintain an action for a further recovery.⁵ But if either party practises fraud in procuring the adjustment or payment, the other may avail himself of it to open the matter, and recover back the loss, if paid.⁶ In *Trefz v. Knickerbocker Life Insurance Company*, a bill in equity to set aside a judgment at law rendered against the insurers the year before,⁷ on the ground that up to and until after the trial at law the fact that

¹ *De Hahn v. Hartley*, 1 T. R. 343; *Kelly v. Solari*, 9 M. & W. 54, 55.

² [*Nat. Life Ins. Co. v. Jones*, 1 N. Y. Supr. Rep. 466 at 471.]

³ [*Kingston Bk. v. Eltinge*, 40 N. Y. 391, and *Union Nat. Bk. v. Sixth Nat. Bk.*, 43 N. Y. 452; citing *Kelly v. Solari*, 9 M. & W. 54.]

⁴ *Mut. Life Ins. Co. v. Wager*, 27 Barb. (N. Y.) 354; *National Life Ins. Co. v. Minch*, 53 N. Y. 144; *ante*, § 442; *Eagan v. Ætna Fire Ins. Co.*, 10 W. Va. 583; *Smith v. Glens Falls Ins. Co.*, 62 N. Y. 85; *American Ins. Co. v. Crawford*, 89 Ill. 62.

⁵ *Mayhew v. Phoenix Ins. Co.*, 23 Mich. 105; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283.

⁶ *Johnson v. Continental Ins. Co.*, 39 Mich. 33; *Northwestern Life Ins. Co. v. Elliott, C. Ct. (Oregon)*, 11 Repr. 325; *Harris v. Equitable, &c. Ass. Co.*, 6 T. & C. (N. Y.) 108; s. c. affirmed, 64 N. Y. 196.

⁷ 6 Ins. L. J. 850.

the insured was a common drunkard, and had died of *delirium tremens*, which fact the defendant "took pains to conceal," and the insurers, using due diligence, were unable to obtain sufficient evidence of until after the judgment, was upheld, as in the nature of an application for a new trial on the ground of newly discovered evidence.¹ [Where insurance has been paid upon false representations of death it may be recovered by the company in assumpsit or in an action for fraud.² But a misrepresentation which was not really relied on by the company or which does not result in making the loss figure more than it really is, will not enable the company to recover insurance money it has paid; the company must have relied on the statement to their damage.³ Fraud in obtaining the policy or fraudulent representations made to obtain the money, will base a claim of the company to a return of the money if they did not know of the fraud at the time they paid it.⁴ But by paying the loss the company waive or settle all questions of law or fact as to the validity of the original contract (except fraud), which they had the means of raising when they paid the loss. Even ignorance of a fact which might have enabled the company to defend an action upon the policy on account of a breach of warranty is not such a mistake of fact as will enable it to recover the money. It will be presumed that the company either knew the fact or intended to waive any such defence, and voluntarily paid the money. Otherwise there would be no end to controversy and litigation, and the insured would hold the money subject to a lawsuit until the statute of limitations intervened.⁵ When one part-owner insured more than his part, and recovered the amount on loss, it was held that the insurer could recover it back, although the insured intended the insurance to be for himself and other co-owners, but neglected so to state

¹ C. Ct. (N. J.), 10 Ins. L. J. 590. See also *National Life Ins. Co. v. Minch*, *supra*; *ante*, § 442; *Hercules Ins. Co. v. Hunter*, 14 Ct. of Sess. Cas. (Scotch), 147, 1187.

² [Northwestern Mut. Life Ins. Co. v. Elliott, 10 Ins. L. J. 333 (Oregon), 1880.]

³ [Royal Ins. Co. v. Byers, 9 Ont. R. 120.]

⁴ [Nat. Life Ins. Co. v. Minch, 53 N. Y. 144.]

⁵ [Ibid.]

in the policy.¹ Money paid by an underwriter with full knowledge of facts but in ignorance of the *law* cannot be recovered back.²]

§ 576. **Remedy ; Agents against Insurers ; Commissions.** — An insurance agent who has voluntarily left the service has no claim to subsequently accruing commissions on policies he obtained.³ And though, in the case last cited, the jury were instructed that if the agent was dismissed without cause he would have a claim, yet if the contract is for commissions on premiums “collected and transmitted,” and is terminable at the pleasure of either party, the agent has no claim for such commissions on premiums not actually collected by him, nor is evidence that it is the custom of other companies to pay commissions on renewals admissible.⁴ But the form of the contract may be such as to give a claim for renewals for a certain time.⁵ In such cases, the rule of damages, where an agent has been discharged during his engagement, is the amount he has lost, less the amount he may have earned. And the testimony of witnesses is competent to show the probable value of renewals during the remainder of the term; but an estimate of his probable earnings after the discharge, based upon the amount of his collections and commissions before the trial, was held to be inadmissible as too speculative.⁶

§ 577. **Remedies by and against Foreign Insurance Companies.** — Where foreign insurance companies are prohibited by statute from entering into contracts of insurance until they have complied with certain conditions, it is generally held that they cannot recover on their premium notes until they have so

¹ [Pearson v. Lord, 6 Mass. 81 at 85.]

² [Bilbie v. Lumley, 2 East, 469 at 472.]

³ Shaw v. Home Life Ins. Co., 49 N. Y. 681; Myers v. Knickerbocker Life Ins. Co., C. C. P. (Pa.), 2 Big. Life & Acc. Ins. Cas. 144.

⁴ Spaulding v. New York, &c. Ins. Co., 61 Me. 329. See also Machette v. N. E. Ins. Co., 1 Brewster, C. C. P. (Pa.), 313; Partridge v. Phoenix Ins. Co., 15 Wall. (U. S.) 573; Medcalf v. Brooklyn Life Ins. Co., 4 Big. Life & Acc. Ins. Cas. 505.

⁵ Ensworth v. N. Y. Life Ins. Co., C. Ct. (Ohio), 1 Big. Life & Acc. Ins. Cas. 645.

⁶ Lewis v. Atlas, &c. Ins. Co., 61 Mo. 534.

complied.¹ And the rule applies to a suit against an agent to recover premiums which he has collected.² And the insured is not so far *in pari delictu* as to prevent his recovering back the premiums paid.³ But a compliance after the negotiation of the contract will permit a recovery.⁴ And a subscription to stock, payable in instalments, is also recoverable. The prohibition does not apply to stock notes given as part of the capital in organizing the company; nor is the taking of such notes "doing business," within the meaning of a statute which prohibits foreign insurance companies from doing business except under certain conditions.⁵ In Missouri, it is held that recovery may be had without such compliance.⁶ Policies and premium notes issued under such circumstances are *generally* held to be valid.⁷ And foreign insurance com-

¹ Jones v. Smith, 3 Gray (Mass.), 500; Wash. County Mut. Ins. Co. v. Dawes, 6 id. 376; Wash. County Mut. Ins. Co. v. Hastings, 2 Allen (Mass.), 398; General Mut. Ins. Co. v. Phillips, 13 Gray (Mass.), 90; Ætna Ins. Co. v. Harvey, 11 Wis. 394; Williams v. Cheney, 8 Gray (Mass.), 206; Cincinnati Mut. Health Ass. Co. v. Rosenthal, 55 Ill. 85; Ford v. Buckeye State Ins. Co., 6 Bush (Ky.), 135; Columbia Ins. Co. v. Kinyon, 37 N. J. 33; American Ins. Co. v. Stoy, 41 Mich. 388.

² Thorne v. Travelers' Ins. Co., 80 Pa. St. 15.

³ Union, &c. Ins. Co. v. Thomas, 46 Ind. 44.

⁴ National Mut. Fire Ins. Co. v. Pursell, 10 Allen (Mass.), 231; Atlantic, &c. Ins. Co. v. Concklin, 6 Gray (Mass.), 73; American Ins. Co. v. Pettijohn, 62 Ind. 382; Daly v. National, &c. Ins. Co., 64 Ind. 1; Mut. Benefit Life Ins. Co. v. Charles, C. Ct. (Ill.), 4 Ins. L. J. 265; United States Life Ins. Co. v. Hessberg, 27 Ohio St. 393.

⁵ Payson v. Withers, C. Ct. (Ind.), 2 Ins. L. J. 599.

⁶ Clark v. Middleton, 19 Mo. 53; Columbus Ins. Co. v. Walsh, 18 id. 229.

⁷ Columbus Ins. Co. v. Walsh, *ubi supra*; Leonard v. Washburn, 100 Mass. 251; Hartford Live Stock Ins. Co. v. Matthews, 102 id. 221; Ehrman v. Union Central Ins. Co., C. Ct. (Ark.), 9 Ins. L. J. 347; Watertown Ins. Co. v. Simons, 96 Pa. St. 520; id. 597; American Ins. Co. v. Wellman, 69 Ind. 413. See also Behler v. German Ins. Co., 68 Ind. 347, where Slaughter's case, to the contrary, 20 Ind. 520, is overruled. [An innocent plaintiff may recover for a loss although the company has not complied with the conditions of the law authorizing it to do business in the state. Ganser v. Fireman's Fund Ins. Co., 34 Minn. 372. A policy or a premium note is not rendered void because the company is a foreign one, that has failed to comply with the law as to prerequisites of doing business. Provincial Ins. Co. v. Lapsley, 15 Gray, 202, 263; Atlantic Mut. Ins. Co. v. Concklin, 6 Gray, 73, 75; Union Mut. Life Ins. Co. v. McMillen, 24 Ohio St. 67, 79; Insurance Co. v. Whipple, 61 N. H. 61; Conn. R. Mut. Fire Ins. Co. v. Way, 62 N. H. 622; Ehrman v. Teutonia Ins. Co., 1 Fed. Rep. 471; 9 Ins. L. J.

panies doing business in a State without complying with the statute of the State relative to the conditions upon which such companies may do business therein, cannot set up their own neglect to comply with the statute as a defence to an action against them for a loss, or to recover premiums paid on an invalid policy.¹ In *Haverhill Insurance Company v. Prescott*,² the suit was on a note, and the question of the validity of the policy did not arise. As against the State, the validity of the certificate of authority to transact business may be inquired into. But whether, if the certificate be valid, the authority conferred by it can be modified by subsequent legislation is an open question.³ The prohibition does not apply where the agent, having no authority to contract, merely forwards the proposals and premium notes to his foreign principal.⁴ Nor do such statutes prevent suits in the Federal courts of the State.⁵ [A foreign company may be served with a summons by service on any one of its agents appointed to transact its business in another State.⁶ Proof of service on the insurance commissioner is good though he refuses to receive the papers.⁷ It has been said that it is questionable

393 (Ark.), 1880. *Contra*, a policy issued in Oregon by a company prohibited from doing business in that State is null and void. *Northwestern Mut. Life Ins. Co. v. Elliott*, 6 Sawy. 17; 10 Ins. L. J. 333. So in *Franklin Ins. Co. v. Louisville, &c. Packet Co.*, 9 Bush (Ky.), 590, 592, it was held that a policy issued by a company that has not complied with the conditions of doing business, is void. A premium note given for a policy in a foreign company which had not complied with the law, is held void. *Hoffman v. Banks*, 41 Ind. 1 at 7.]

¹ *Swan v. Watertown Fire Ins. Co.*, 96 Pa. St. 37; 10 Ins. L. J. 392; *Daniels v. Citizens' Ins. Co., C. Ct. (Ind.)*, 11 Repr. 420; *Union Central Ins. Co. v. Thomas*, 46 Ind. 44.

² 42 N. H. 547.

³ *Hartford Ins. Co. v. Kansas*, 9 Kans. 210.

⁴ *Bowser v. Lamb, C. Ct. (Ind.)*, 6 Ins. L. J. 375. See also *ante*, § 66; *Clay Fire Ins. Co. v. Huron, &c. Co.*, 31 Mich. 346; *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. 33.

⁵ *Northwestern Ins. Co. v. Elliott, C. Ct. (Oregon)*, 10 Ins. L. J. 333.

⁶ [*Johnson v. Hanover Fire Ins. Co.*, 15 Fed. Rep. 97; 11 Biss. 452 (Ill.), 1883; *Moch v. Virginia Fire, &c. Ins. Co.*, 4 Hughes, 61; 10 Fed. Rep. 696 (Va.), 1882.]

⁷ [*Knapp, &c. Co. v. Nat. Mut. Fire Ins. Co.*, 30 Fed. Rep. 607 (Mo.), 1887.]

whether a suit to wind up a foreign company or interfere with its affairs, can be maintained in New York.^{1]}

§ 578. **Foreign Insurance Company; Right to remove Action.** — It was formerly held in several of the States that if a foreign insurance company submits itself to the exclusive jurisdiction of the courts of a State, as a condition of the privilege of doing business in that State, it waives any right it may possess as a *quasi* citizen of another State to remove to the courts of the United States an action commenced in the courts of such State, upon a cause of action accruing there. But it has since been decided by the Supreme Court of the United States that such submission is not a waiver if the petition for removal be made before a final trial, which is held to mean the last trial if successive trials are had.² And the rule applies to a British insurance company doing business in one of the States of the Union.³ Now, under act of Congress, March 3, 1875, State courts are held to have no authority to pass upon the question of removal, or to consider the sufficiency of the petition or bond.⁴ If the petition or bond prove defective, the case will be remanded.⁵

§ 578 a. **Foreign Insurance Company; Retaliatory Legislation, &c.** — In Alabama it was recently held that retaliatory legislation, by which the same taxes, fines, penalties, and disabilities imposed by other States respectively upon Alabama companies should be imposed upon the companies from those States doing business in Alabama, was unconstitutional, as conflicting with the principle of uniformity of taxation.⁶ And so it has been held in Indiana, and, it seems, in Georgia.⁷ [But a State may place a tax on a foreign corporation as a price of its doing business therein.⁸ And retaliation as to restrictions,

¹ [Taylor v. Charter Oak Life Ins. Co., 8 Abb. N. C. 331.]

² Insurance Co. v. Morse, 20 Wall. 445; Doyle v. Continental Ins. Co., 94 U. S. 535. See also State v. Doyle, 40 Wis. 175, criticising Morse's case; Tennessee v. Davis, 100 U. S. 257.

³ Terry v. Imperial Ins. Co. (C. Ct., Kan.), 4 Ins. L. J. 824.

⁴ Osgood v. Chicago, &c. R. R. Co., Ch. Legal News, April 17, 1875; O'Malia v. Home Ins. Co., C. C. P. (Pa.), 4 Ins. L. J. 719.

⁵ McMurdy v. Conn. Ins. Co., C. Ct. (Pa.), 6 Ins. L. J. 666.

⁶ Clark v. Mobile (Ala.), 10 Ins. L. J. 357.

⁷ Ibid., note.

⁸ [Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566 at 576.]

formalities, &c., is unquestionably lawful. It is only upon the question of taxation that the plea of unconstitutionality can be made. For example, Iowa extends against companies of any other State the same restrictions as are imposed on Iowa companies by the laws of that State.¹ A foreign corporation has no right to do business in a State without that State's consent, and then only subject to its conditions.² A State statute making certain provisions as to licensing and taking a bond from foreign insurance companies, is not in conflict with the clause of the United States Constitution, as to "privileges and immunities of citizens," nor with the one that "Congress has power, &c., to regulate commerce." Furthermore, corporations are not citizens outside of their own States.³ A company doing business in another State than its home must be bound by its laws, and its contracts are interpreted by those laws.⁴ A foreign company cannot withdraw itself from the operation of the laws of the state in which it is doing business, by provisions put in its policies.⁵ The "Fire Insurance Act" R. S. O. ch. 162, is applicable to all companies, foreign or not, licensed to do business in the Dominion and taking risks on property in *Ontario*.⁶

§ 579. **Evidence.** — The general rules of evidence, as laid down in the special treatises on that subject, are applicable to the contract of insurance as well as to other contracts. [The burden of proving a loss from a cause and to an amount for which the insurers are liable is upon the assured.⁷ When the policy provided that the assurers should not be liable unless the loss were at least $7\frac{1}{2}$ per cent, the onus is on the assured to show that there was such a loss.⁸ If testimony as to a

¹ [State v. Fidelity, &c. Co., 77 Iowa, 648; 18 Ins. L. J. 774.]

² [N. Y. Life Ins. Co. v. Best, 23 Ohio St. 105 at 113, citing Paul v. Virginia, 8 Wall. 168; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, 576.]

³ [Paul v. Virginia, 8 Wall. 168; Ducat v. Chicago, 10 Wall. 410.]

⁴ [Queen Ins. Co. v. Jefferson Ice Co., 64 Tex. 578; Thwing v. Insurance Co., 111 Mass. 93; Cox v. United States, 6 Pet. 172.]

⁵ [Fletcher v. N. Y. Life Ins. Co., 13 Fed. Rep. 526 (Mo.), 1882.]

⁶ [Citizens', &c. Ins. Cos. v. Parsons, 4 Can. Supr. Ct. R. 215.]

⁷ [Cory v. Boylston Ins. Co., 107 Mass. 140 at 147; Heebner v. Eagle Ins. Co., 10 Gray, 131 at 143.]

⁸ [Merchants' Mut. Ins. Co. v. Wilson, 2 Md. 217 at 244.]

disputed fact is equally balanced, he who affirms it must fail.¹ Where the insurable interest of the plaintiff is put directly in issue by the pleadings he must prove title.² In case of a warranty that the subject-matter insured is neutral property, it is usual at the trial to give general evidence of the truth of that warranty, and leave it to the defendant to falsify it.³ Evidence of former transactions between the parties is admissible to prove the meaning of the parties in the matter in question.⁴ When a policy is made in the name of another than the plaintiff, it is necessary for the plaintiff to show not only the policy, but his interest therein, and there must be something to show that the party effecting the policy in his own name intended to embrace the interest of the person who sues thereon.⁵ Upon a valued policy it is only necessary to prove, at law, a substantial interest in a subject corresponding to and satisfying the description in the policy.⁶ When the policy provides that it shall be sufficient proof of interest in case of loss,—if there is judgment against the company by default, the plaintiff in the writ of inquiry needs only to prove the defendant's subscription to the policy without proving interest therein.⁷ The proof of the description of the premises need not be as particular as in ejectment. Reasonable evidence that the house burned was on the plaintiff's land is sufficient.⁸ Evidence of conversation between the assured and the agent to prove that the description is not the former's, is admissible.⁹ The misrepresentation of the "life" in a prior application of his own cannot be imported into a subsequent transaction in which a creditor insures the said life, and in his application leaves blank the question wrongly answered by the "life" on the previous occasion.¹⁰ A copy of the proofs of loss may be in-

¹ [Rogers v. Traders' Ins. Co., 6 Paige, 583.]

² [Planters' Ins. Co. v. Diggs, 8 Baxter (Tenn.), 563 at 565.]

³ [Ludlow v. Union Ins. Co., 2 S. & R. 118 at 133.]

⁴ [Bourne v. Gatliff, 11 Cl. & F. 45 at 70.]

⁵ [De Bolle v. Penn Ins. Co., 4 Whart. (Tenn.) 68 at 69.]

⁶ [Atlantic Ins. Co. v. Lunar, 1 Sandf. Ch. (N. Y.), 91 at 97.]

⁷ [Thelluson v. Fletcher, Doug. 315 at 316.]

⁸ [Breckinridge v. Amer. Cent. Ins. Co., 87 Mo. 62.]

⁹ [Maher v. Hibernian Ins. Co., 6 Hun, 353 at 355.]

¹⁰ [Conn. Mut. Life Ins. Co. v. Luchs, 108 U. S. 498, 509.]

troduced in showing compliance with the requirements of the policy, but not to prove the loss.¹ A written application for a policy is the best evidence of what it contains, and secondary evidence will not be received unless the impossibility of procuring the best is shown.² A company refused to receive an overdue premium, the insured sued to recover the premiums paid, averring the forfeiture unlawful and offering the policy in evidence. On objection of the company, the policy was excluded. The defence was non-payment of premium. It was held that in the absence of the policy, forfeiture for non-payment could not be presumed, and that the policy could not be introduced by the defendant, after it had objected to such admission.³ When the action was on a policy for alleged damage to blankets from sea-water, and the defence was that the damage arose in manufacture and packing, evidence was held admissible to prove that other bales of blankets from the maker had sustained the same kind of damage.⁴ The admissions of an adjusting agent are competent against the company.⁵ The declarations of the company's agents while adjusting a loss are admissible against the company.⁶ The physician's incompetency to testify of information received from a patient may be waived by the latter, and his waiver in his application precludes all who claim under him.⁷ The improper admission of evidence is not cured by subsequent instructions to the jury to disregard it.⁸

[§ 579 A. **Declarations of the Life-subject** are not admissible against the beneficiary unless part of the *res gestæ*. The declarations of the "life" after issue of the policy are not competent against the beneficiary.⁹ Evidence of declarations made by the

¹ [Hiles v. Hanover Fire Ins. Co., 65 Wis. 585; People's Acc. Ass. v. Smith, 126 Pa. St. 317; Commonwealth Ins. Co. v. Sennet, 41 Pa. St. 161; Lycoming Ins. Co. v. Schreffler, 42 Pa. St. 188.]

² [Lewis v. Hudmon, 56 Ala. 186.]

³ [American Life Ins. Co. v. McAder, 109 Pa. St. 399.]

⁴ [Bradford v. Boylston Fire & Mar. Ins. Co., 11 Pick. 162 at 166.]

⁵ [Bartlett v. Fireman's Fund Ins. Co., 77 Iowa, 155.]

⁶ [Bowes v. National Ins. Co., 20 N. B. R. 438.]

⁷ [Adreveno v. Mut. Res. Fund Life Ass., 34 Fed. Rep. 870 (Mo.), 1888.]

⁸ [Lycoming Fire Ins. Co. v. Rubin, 79 Ill. 402 at 408.]

⁹ [Dial v. Valley Mut. Life Ass., 29 S. C. 560.]

insured before insuring for the benefit of his wife, are not admissible against her as inconsistent with his warranties, unless they had reference to his acts, or some fact connected with his bodily condition.¹ And even where so connected they are not admissible unless part of the *res gestæ*. Where C. and his wife make joint application for a policy on C.'s life for the sole benefit of the wife, evidence will not be admitted in a suit by the wife to show that C. had made declarations at a time prior to the application, that were contradictory to his answer in the application concerning his health for years past. In making the prior declarations he did not act as the agent of his wife, they were the acts of a stranger and could not affect her.² If, however, the statements of the life-subject contradictory to his representations in the application, as to his health, for example, were made so near the time of the application as to be part of the *res gestæ*, they are admissible against the beneficiary ; otherwise not.³

[§ 579 B. Parol evidence of what passed at the time of making a policy is not admissible to restrain the effect of the same.⁴ Parol evidence that "27th" in the margin of a policy should be "20th" and that a memorandum so stating was left with the underwriters, is inadmissible at law, though equity might reform the contract.⁵ Evidence for the company to show that the word "epidemics" included yellow fever by the understanding of both parties, has been held inadmissible. The agreement was in writing without ambiguity, and the ordinary meaning of the words could not be varied or explained by oral evidence of the intent of the parties.⁶ Evidence is admissible to show that by the usage of the junk dealer's trade the words "rags" and "old metals" have a broader meaning than commonly belongs to them. It was shown that "rags" means all articles used in the manufacture of paper, and that the term "old metals" includes

¹ [Terwilliger v. Royal Arcanum, 49 Hun, 305.]

² [Union Cent. Life Ins. Co. v. Cheever, 36 Ohio St. 208.]

³ [Schwarzbach v. Protective Union, 25 W. Va. 622, 646-647.]

⁴ [Weston v. Emes, 1 Taunt. 115 at 117.]

⁵ [Ewer v. Washington Ins. Co., 16 Pick. 502 at 503.]

⁶ [Pohalski v. Mut. Ins. Co., 45 How. Pr. R. 504 at 511.]

old rubber and old glass.¹ No *usage* of an insurance company nor even the express agreement of the parties, whether made previous to or at the time of the execution of the policy, can be admitted to explain, modify, or control the written contract.² Evidence, outside of the policy, of facts and circumstances, to show the intention of the parties, is admissible, when the policy is not clear.³ Parol is admissible to show that a policy written for \$2000 was intended to be for \$1000, and that the rate was that appropriate to a \$1000 policy;⁴ and to show that a written assignment of a policy was collateral security for an obligation now settled.⁵ A circular issued by the company stating that "thirty days' grace would be allowed on all payments after the first" cannot be admitted to vary the actual terms of the policy.⁶

§ 580. **Evidence ; Experts.**—In *Joyce v. Maine Insurance Company*,⁷ it was decided that an expert in insurance matters could not be permitted to give his opinion whether "the rate of premium for insurance would be increased by vacating a dwelling-house." The condition, made part of the contract, made the insurance void and of no effect if the risk should be increased by any means whatever within the control of the insured. It was said not to be a question of science or skill. So it has been held, and for a like reason, that, under substantially similar terms of the contract, experts could not be permitted to testify whether "leaving a dwelling-house unoccupied for a considerable length of time" was an increase of risk.⁸ And generally their opinions as to the materiality of certain facts to the risk are incompetent.⁹ But in *Schenck*

¹ [Mooney v. Howard Ins. Co., 138 Mass. 375]

² [Ill. Mut. Fire Ins. Co. v. O'Neile, 13 Ill. 89 at 93]

³ [Mauger v. Holyoke Mut. Fire Ins. Co., 1 Holmes (U. S. C. C.), 287 at 289. (The question was as to what goods were covered.)]

⁴ [Ætna Life Ins. Co. v. Brodie, 5 Can. Supr. Ct. 1.]

⁵ [Summers v. U. S. Ins. Co., 13 La. Ann. 504 at 505.]

⁶ [Fowler v. Metropolitan Life Ins. Co., 116 N. Y. 389.]

⁷ 45 Me. 168.

⁸ *Luce v. Dorchester Mut. Fire Ins. Co.*, 105 Mass. 298; *Cannell v. Phoenix Ins. Co.*, 59 Me. 582. In *Foy v. Ætna Ins. Co.*, 3 Allen (N. B.), 29, such evidence was admitted without objection.

⁹ *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72; *Hartford Prot. Ins. Co.*

v. Mercer County Mutual Insurance Company,¹ a fireman was allowed to testify whether the risk of fire was increased by certain alterations; and it was decided in the case last cited from Massachusetts that the question, whether such leaving a dwelling-house unoccupied is material to the risk, might be tested by the question whether underwriters generally would in such case charge a higher premium.² The first question was said to be as to a subject within common knowledge, as to which opinions were inadmissible, while the latter related to a matter which was within the peculiar knowledge of persons versed in the business of insurance. The distinction, though fine, seems to be sound; it is between an inadmissible opinion and an admissible fact. The inference of increased risk, based upon the fact known to him of a higher rate of premium in such cases, cannot be stated by the witness; but he may state the fact, which is to him a matter of special knowledge, and from this the jury may draw the inference of increased risk. That persons having this peculiar knowledge may testify thereto is a well-settled rule of evidence.³ But the insurer cannot be permitted to testify that he would not have taken the risk had he known the facts.⁴ [Whether or not a witness is entitled to be heard as an "expert" is for the court in the first instance.⁵ An expert witness may be impeached by showing that upon a

v. Harmer, 2 Ohio St. 452; *Hill v. Lafayette Ins. Co.*, 2 Mich. 476. *Contra*, *Kern v. South St. Louis Mut. Fire Ins. Co.*, 40 Mo. 19.

¹ 4 Zab. (N. J.) 447.

² And see also *Merriam v. Middlesex Ins. Co.*, 21 Pick. 162; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416; *Hobby v. Dana*, 17 Barb. (N. Y.) 111.

³ *Webber v. Eastern Railroad Co.*, 2 Met. (Mass.) 147; *Mulry v. Mohawk Valley Ins. Co.*, 5 Gray (Mass.), 541; *Hawes v. New England Ins. Co.*, 2 Curtis (C. Ct.), 229; *Lyman v. State Ins. Co.*, 14 Allen (Mass.), 329; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; *Quin v. National Ass. Co.*, *Jones & Cary (Irish)*, 316.

⁴ *Campbell v. Rickards*, 5 B. & Ad. 840; *Perkins v. Equitable Ins. Co.*, 4 Allen (N. B.), 562. In *Martin v. Franklin Ins. Co.*, 42 N. J. 46, an insurance agent was permitted to testify at what rate he could have procured insurance on the property in question.

⁵ [*Gulf City Ins. Co. v. Stephens*, 51 Ala. 121 at 123-124.]

former occasion he had expressed a different extra-judicial opinion.^{1]}

§ 581. **Evidence ; Experts.** — In life insurance, physicians may give their opinion as to the causes of disease, and whether a particular disease or infirmity or injury or habit is the cause of death, or tends to shorten life ;² but neither they nor experts in insurance can be allowed to give their opinion upon the question whether the applicant was an insurable subject, nor whether certain facts render the subject uninsurable.³ Nor can experts be permitted to testify what would have been their opinion upon hypothetical facts. These opinions must be based upon observation, or upon proved facts.⁴

§ 582. **Evidence ; Custom.** — Evidence of a particular custom of the insurers, not brought home to the knowledge of the insured, is inadmissible.⁵ But evidence of a general custom of insurance companies, as, for instance, to charge a higher rate of premium on unoccupied dwelling-houses, is admissible, on the issue whether there is an increase of risk in a case where a dwelling-house occupied at the time of insurance was afterwards left unoccupied.⁶ So of a general custom of insurance companies to give thirty days' grace for the payment of the annual premiums.⁷ So the usage of life insurance companies is competent evidence, in a question between them and their agents, as to the nature and amount of interest the latter may have in the policies they procure.⁸

§ 583. **Evidence ; Wilful Burning.** — Where the defence to an action on a policy of insurance involves the proof of a

¹ [Patchin v. Astor. Mut. Ins. Co., 3 Kern. 268 at 272 ; Sanderson v. Nashua, 44 N. H. 492.]

² Miller v. Mut. Ben. Life Ins. Co., 31 Iowa, 216.

³ Rawls v. Am. Life Ins. Co., 36 Barb. 357 ; s. c. affirmed, 27 N. Y. 282.

⁴ Higbie v. Guardian Mut. Life Ins. Co., 53 N. Y. 603.

⁵ Adams v. Otterbach, 15 How. (U. S.) 539 ; Carter v. Boehm, 3 Burr. 1905 ; Hartford Prot. Ins. Co. v. Harmer, 2 Ohio St. 452 ; Luce v. Dorchester Mut. Fire Ins. Co., 105 Mass. 298 ; Taylor v. Ætna Life Ins. Co., 13 Gray (Mass.), 434.

⁶ Luce v. Dorchester Mut. Fire Ins. Co., 105 Mass. 298.

⁷ Helme v. Phila. Life Ins. Co., 61 Pa. St. 107. But see *contra*, Mut. Ben. Life Ins. Co. v. Ruse, 8 Ga. 534.

⁸ Ensworth v. New York Life Ins. Co. (C. Ct. U. S.), North Dist. Ohio, 7 Am. Law Reg. n. s. 332. But see *contra*, § 576.

crime, as the wilful setting fire to the premises, or the designedly casting away a vessel, the authorities differ upon the question of proof whether the rule in civil or criminal cases shall be the guide. In *Thurtell v. Beaumont*,¹ the jury were instructed that they must be as clearly satisfied of the fact as if the insured were on trial on the criminal charge. The rule is the same in Scotland.² And this rule was adopted in the case of *Shultz v. Pacific Insurance Company*.³ And so it has been apparently held on the authority of *Thurtell v. Beaumont*, in Illinois,⁴ though the point was not much considered. But reason and the weight of authority are the other way.⁵ [It is not necessary to tell the jury that the evidence need not be as strong as on a criminal suit. It is enough to state the rules of evidence that *do* apply without stating those which do not.⁶ Upon a charge that the plaintiff caused or procured the fire, every circumstance that throws light on the plaintiff's motives may be inquired into, such as, over-insurance, excessive proof of loss, assignment of policy, or disposition of goods in a manner aside from the usual

¹ 1 Bing. 339.

² *Hercules Ins. Co. v. Hunter*, 15 Ct. of Sess. Cas. 800.

³ Sup. Ct. of Florida, 2 Ins. L. J. 495; [*Kane v. Hibernia Mut. Fire Ins. Co.*, 38 N. J. 441 at 446. See, however, second note below.]

⁴ *McConnel v. Delaware Ins. Co.*, 18 Ill. 228; *Gordon v. Parmelee*, 15 Gray, 416.

⁵ *Schmidt v. N. Y. Union Mut. Fire Ins. Co.*, 1 Gray (Mass.), 529; *Washington Ins. Co. v. Wilson*, 7 Wis. 169; *Wightman v. West. Mar. & Fire Ins. Co.*, 8 Rob. (La.) 442; *Hoffman v. West. Mar. & Fire Ins. Co.*, 1 La. Ann. 216; *Scott v. Home Ins. Co.*, 1 Dillon (C. Ct. U. S.), 105; *Bayly v. Lancashire, &c. Ins. Co.*, C. Ct. (La.), 4 Ins. L. J. 503; *Ellis v. Buzzell*, 60 Me. 209; *Marshall v. Thames Fire Ins. Co.*, 43 Mo. 586; *Knowles v. Scribner*, 57 Me. 495, 497; *Matthews v. Huntley*, 9 N. H. 146, 150; *Folsom v. Brawn*, 5 Foster (N. H.), 114, 122; *Sibley v. St. Paul Ins. Co.*, C. Ct. (Ill.), 8 Ins. L. J. 461; *Kincade v. Bradshaw*, 3 Hawk. (N. C.) 63, 65; *Blaeser v. Milwaukie, &c. Ins. Co.*, 37 Wis. 31; *Howell v. Hartford, &c. Ins. Co.*, C. Ct. (Ill.), 3 Ins. L. J. 649, 653. [A preponderance of evidence is sufficient. *Carlwitz v. Germania Fire Ins. Co.*, 12 Ins. L. J. 127 (N. J.), 1883; *Somerset County Mut. Fire Ins. Co. v. Usaw*, 112 Pa. St. 80; *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59; *Huchberger v. Merchants' Fire Ins. Co.*, 4 Biss. 265 at 266; *Mack v. Lancashire Ins. Co.*, 2 McCrary, 211 at 215; *Ætna Ins. Co. v. Johnson*, 11 Bush (Ky.), 587 at 593; *Regnier v. La. St. Ins. Co.*, 12 La. 337 at 342; *Simmons v. Insurance Co.*, 8 W. Va. 474 at 499.]

⁶ [*Bayley v. Lond. & Life Ins. Co.*, 4 Ins. L. J. 503, 508 (U. S. C. C.), 1875.]

course of business, &c.¹ Evidence of the plaintiff's good character is admissible.² A suggestion by the assured that the fire might have originated in some oiled shavings in the cellar is no evidence of arson.³ It is error to charge that the burden is on the plaintiff to show the loss an honest one. There is no presumption that the insured burns his house or is in fault, but a contrary presumption.⁴

§ 584. **Evidence ; Issue of Policy ; Signing Application ; Receipt of Premium ; Organization of Company.** — The recital in a premium note that a policy has issued is *prima facie* evidence of that fact against the maker of the note.⁵ So the statement of the secretary that a policy has issued, in an action of covenant on a lost policy, is sufficient evidence that the policy was issued.⁶ The court were divided, in *Foster v. Mentor Life Assurance Company*,⁷ on the question whether the insured, having accepted a policy reciting that he had signed the declaration, might show to the contrary, two judges thinking the jury should decide the question of signature, and two holding that the jury should be instructed that the recital was *prima facie* proof of the signature. And by the weight of authority the recital in a delivered policy or the receipt of the premium is *prima facie*, and only *prima facie*, evidence of the fact.⁸ But it is held to be conclusive in Illinois⁹ and

¹ [Dwyer v. Continental Ins. Co., 63 Tex. 354.]

² [Mosley v. Vt. Mut. Fire Ins. Co., 55 Vt. 142.]

³ [Farmers' Mut. Fire Ins. Co. v. Gargett, 42 Mich. 289 at 292.]

⁴ [Dwyer v. Continental Ins. Co., 57 Tex. 181.]

⁵ New England Mut. Fire Ins. Co. v. Belknap, 9 Cush. (Mass.) 140.

⁶ Sussex County Mut. Ins. Co. v. Woodruff, 2 Dutch. (N. J.) 542; *Harding v. Carter, Park, Ins.* 5.

⁷ 3 E. & B. 48; s. c. 24 Eng. L. & Eq. 103.

⁸ *Sheldon v. Atlantic Fire & Mar. Ins. Co.*, 26 N. Y. 460; *Insurance Co. of Penn. v. Smith*, 3 Whart. (Pa.) 520; *Baker v. Union Mut. Life Ins. Co.*, 43 N. Y. 233, reversing s. c. 6 Robt. 393; *Bergson v. Builders' Ins. Co.*, 38 Cal. 541; *Robert v. New England Mut. Life Ins. Co.*, 2 Disney (Ohio), 106; *Pitt v. Berkshire Life Ins. Co.*, 100 Mass. 500; *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 32; *ante*, § 359; *Union Ins. Co. v. Grant*, 68 Me. 229. A mere receipt is no contract. It is a mere statement of a fact, and may always be contradicted. *The Tuskar*, 1 Sprague (U. S. Dist. Ct. Mass.), 71; *Hildreth v. O'Brien*, 10 Allen (Mass.), 104; 1 Greenl. Ev. § 305.

⁹ *Prov. Life Ins. Co. v. Fennell*, 49 Ill. 180.

in Maryland.¹ The production of a premium note, signed by the insured, is also *prima facie* evidence, as against him, that the company is duly organized.²

§ 585. **Evidence; Chronic Disease; State of Health; Death.** — A *post mortem* examination, fifteen hours after death, in New Orleans, in October, developing an inflammation and ulceration of the intestines, which in the opinion of the physicians had been of long standing, is not sufficient evidence of chronic disease existing in June of the same year, in a climate where fifteen hours of mortification may have made great ravages, especially if at that time the insured appeared in perfect health.³ In *Schaible v. Washington Life Insurance Company*, a photograph of the deceased, taken a short time before the insurance was effected, was permitted to go to the jury as evidence of the physical appearance and condition of the assured at that time.⁴ The sudden disappearance of the insured, and inability to find him after diligent search, under circumstances where he could not well go long without discovery, he being in such a physical and mental condition as to excite anxiety, are sufficient to justify a finding of death.⁵ Letters testamentary are not competent evidence of the death of the person upon whose estate the letters are issued.⁶ Absence for seven years without being heard from raises a presumption of death; but there is no presumption from this fact alone as to the time of death during the period of absence. This must depend upon other circumstances.⁷ [Proofs of death furnished by the plaintiffs to the company are admissible in favor of the latter.⁸]

§ 586. **Evidence; Effect of Misrepresentation.** — In *Washington Life Insurance Company v. Haney*, the president of

¹ Consolidated Ins. Co. v. Cashow, 41 Md. 59.

² Williams v. Cheney, 3 Gray (Mass.), 215; Topping v. Bickford, 4 Allen (Mass.), 120.

³ Murphy v. Mut. Ben. Life Ins. Co., 6 La. Ann. 518.

⁴ Leg. Int. vol. v. p. 232, July 18, 1873

⁵ John Hancock, &c. Ins. Co. v. Moore, 34 Mich. 41.

⁶ Mutual Benefit Ins. Co. v. Tisdale, 91 U. S. 238, reversing s. c. 3 Ins. L. J. 59.

⁷ Hancock v. American Life Ins. Co., 62 Mo. 26.

⁸ [Goldschmidt v. Mut. Life Ins. Co., 33 Hun, 441.]

the insurance company which issued the policy was not permitted to testify that the policy was issued in the belief that the statements in the application were true, and that no policy would have been issued had the company had any reason to believe that the representations and answers were in any respect false. It is to be presumed that a policy is issued upon the facts stated in the application; and how far false statements, if any there are in the application, affect the validity of the contract, is a question of law for the court, and not one to be settled by the opinion or judgment of either party.

§ 587. **Evidence ; Intentional Suicide ; Fraud ; Character ; Value.** — A man's religious belief or unbelief affords no ground upon which to infer whether he intentionally commits suicide or not, and cannot be put in evidence.¹ And proof of good character is inadmissible on an issue of fraudulent overvaluation of loss.² The value of other similar neighboring properties is evidence of the value of the property burned or lost.³

[§ 587 A. **Variance.** — In an action on a policy on a frame dwelling-house the answer alleged that the assured used and occupied the building insured, at the time he procured the policy, and afterward, as a boarding house and hotel, and that the policy was thereby rendered void. No change in the occupation was alleged. Evidence that the building after the date of the policy was occupied as a hotel without the consent of the defendant was excluded as being a different defence from the answer, and one requiring special pleading.⁴ But an honest mistake of the assured in his proofs of loss as to the manner in which the fire originated may be corrected at the trial by contradictory evidence, when such will not operate as a surprise to the insurer.⁵ And when the pleadings allege the proofs without averment of the mistake, the variance must be

¹ *Gibson v. Am. Mut. Life Ins. Co.*, 37 N. Y. 580.

² *Fowler v. Aetna Fire Ins. Co.*, 6 Cow. (N. Y.) 673.

³ *Haines v. Republic Fire Ins. Co.*, 52 N. H. 467 ; *Howard v. City Fire Ins. Co.*, 4 Denio (N. Y.), 502.

⁴ [*Pierce v. Cohasset Ins. Co.*, 123 Mass. 572 at 573.]

⁵ [*Waldeck v. Springfield Fire & Mar. Ins. Co.*, 53 Wis. 129 at 131.]

disregarded under § 2669 R. S. The fact that the plaintiff states in his preliminary proofs under oath that the fire was caused by X. does not preclude him in the absence of fraud from showing at the trial that it was caused by Y.¹ The insured may show that the death was by accident, although she has stated in her proofs of loss that it was by suicide.²

[§ 587 B. Court and Jury. — Whether or not a misrepresentation as to title and incumbrances is material or fraudulent is for the jury, and must not be withdrawn from them.³ Whether inquiries and answers in the application are material or not is a question for the court.⁴ If all the evidence given and inferences to be drawn are not legally sufficient to establish the fact in issue, it is not to be left to the jury to find the fact.⁵ The decisions of State courts, except upon points arising under a statute, are not binding on United States courts in ascertaining the meaning and effect of an insurance contract. But the law of the State will govern so far as the right to maintain an action at common law is concerned.⁶ It is no objection to a special juror being sworn, in an action against a life insurance company, that he is a director in another company unless that company has granted an unpaid policy to the same person as in this suit.⁷

§ 588. Pleading. — The rules of pleading, as well as of evidence, are the same in their application to the contract of insurance as to other contracts, though these are to a greater extent modified by local laws. These modifications it is not proposed to state. Nor is it proposed to consider the subject of pleading generally, but only to state some general rules of such frequent occurrence in practice as to make a statement here specially convenient.

§ 589. General Statement of Plaintiff's Case. — In declaring upon a contract of insurance, it, or so much of it as will show

¹ [Smiley v. Citizens' Fire, Mut. & Life Ins. Co., 14 W. Va. 33 at 40.]

² [Keels v. Mut. Reserve Fund Ass., 29 Fed. Rep. 198 (S. C.), 1886.]

³ [Bellatly v. Thomaston Mut. Fire Ins. Co., 61 Me. 414 at 417.]

⁴ [Mullin v. Vt. Mut. Fire Ins. Co., 54 Vt. 223.]

⁵ [Fay v. Alliance Ins. Co., 16 Gray, 455 at 461.]

⁶ [Sias v. Roger Williams Ins. Co., 9 Ins. L. J. 154, 1st Cir. N. Y. 1880.]

⁷ [Craig v. Fenn, 1 Car. & Mar. 43.]

a right to recover, must be set out in terms or in substance. The rule that obtains in declaring upon a penal bond at common law, where the plaintiff may simply count on the bond, and leave the defendant to set up the condition and plead performance, does not obtain here. [If the pleading is based on an instrument required to be in writing, it will be subject to demurrer unless a copy is attached.¹ The complaint must exhibit the policy or a copy of it.² If the application is set out *in hæc verba*, as part of the declaration, the legal effect is the same as if every fact therein had been expressly averred in the ordinary way.³ If the application is made part of the policy the policy is not admissible in evidence without the application, if it is in the power of the party to produce it.⁴ In Indiana and Michigan, however, there is authority that the application need not be set out though made a part of the policy by reference.⁵] As in cases of insurance the money is only recoverable on the performance of certain acts by the insured and the existence of certain facts, the performance of these acts and the existence of these facts must be alleged.⁶ But

¹ [King v. Enterprise Ins. Co., 45 Ind. 43 at 54.]

² [Ind. Ins. Co. v. Hartwell, 100 Ind. 566.]

³ [Continental Life Ins. Co. v. Rogers, 119 Ill. 474.]

⁴ [Lycoming Fire Ins. Co. v. Storrs, 97 Pa. St. 354; American Underwriter's Ass. v. George, id. 238.]

⁵ [Continental Life Ins. Co. v. Kessler, 84 Ind. 310; Throop v. N. A. Fire Ins. Co., 19 Mich. 423, 439, Christiancy, J., dissenting, because he rightly deemed it as necessary for the plaintiff to establish his compliance with such warranties as the application might contain as with any other warranties pertaining to the contract.]

⁶ [It has been said that performance of conditions must be *specifically* averred. Perry v. Phoenix Ass. Co., 8 Fed. Rep. 643, 1st Cir. (R. I.) 1881. It is not necessary, however, to set out the precise words of each condition and allege performance in detail. Tripp & Bailey v. Insurance Co., 55 Vt. 100. And it is usually held that a general averment that the plaintiff has performed all the conditions of the policy is sufficient. Commercial Union Ins. Co. v. State, 113 Ind. 331; Amer. Cent. Ins. Co. v. Sweetser, 116 Ind. 370; Ferrer v. Home Mut. Ins. Co., 47 Cal. 417 at 431 (statute). But when the policy provides that the loss shall be paid sixty days after due notice and proof, it is not sufficient to aver in the declaration that "all the conditions of the policy have been complied with." This shows no cause of action. It must be averred that the sixty days have elapsed. That is not one of the conditions of the contract within the meaning of a statute permitting the general pleading of performance of all con-

this applies only to conditions and facts precedent. Conditions subsequent to the right of recovery, and all acts to be done by the insurers in discharge of their liability, may be omitted from the declaration, and left for the insurers to set up in defence.¹ And upon the same principle it has been held that a covenant that the capital stock and funds of the company should be subject and liable to make good, and should be applied to pay and make good, all such losses and damages as might happen to the subject-matter of insurance within a certain amount, and that the capital stock and funds of the company should alone be liable, is an absolute covenant on the part of the company to pay the sum insured when a loss should happen; and it is not necessary to aver in the declaration the sufficiency of the capital stock and funds, that being a matter to be pleaded by the insurers, if a defence at all.² [It is a necessary part of the plaintiff's *prima facie* case to show that he furnished proofs of death to the company, as required by the policy. He shows no right of recovery without such evidence.³ The plaintiff must plead notice of loss and proofs or waiver of them.⁴ The giving of notice and proofs must be alleged and proved.⁵ Proof as to waiver of notice of loss may be made without special averment in the pleading.⁶] The weight of authority seems to be that, under an allegation

ditions. *Doyle v. Phoenix Ins. Co.*, 44 Cal. 264 at 269; *Carberry v. German Ins. Co.*, 51 Wis. 605 at 609. The petition must always aver the lapse of the time necessary before action can be brought,—the sixty days after proof or other time allowed for payment, &c. *Von Genechtin v. Citizens' Ins. Co.*, 75 Iowa, 544; *Cowan v. Phenix Ins. Co.*, 78 Cal. 181.]

¹ *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Home Ins. Co. v. Duke*, 43 Ind. 418; *Phoenix Ins. Co. v. Perkey*, 92 Ill. 164; *Edgerly v. Farmers' Ins. Co.*, 48 Iowa, 644; *Campbell v. American Pop. Life Ins. Co.*, 4 Am. Law Times (U. S.), 6; s. c. 1 Big. Life & Acc. Ins. Cas. 16; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381. A more general statement seems to be permissible in Louisiana. *Mason v. La. St. Mar. & Fire Ins. Co.*, 1 Rob. (La.) 192; *Perry v. Phoenix Ass. Co.*, C. Ct. (R. I.), 12 Repr. 584.

² *Sunderland Mar. Ins. Co. v. Kearney et al.*, 6 Eng. L. & Eq. 312.

³ [*Schwarzbach v. Protective Union*, 25 W. Va. 624, 667.]

⁴ [*Ind. Ins. Co. v. Capehart*, 108 Ind. 270; *East Texas Fire Ins. Co. v. Dyches*, 56 Tex. 565; *Fire Ins. Ass. v. Miller*, 2 Tex. Civ. Cas. § 334; *McCormack v. North Brit. Ins. Co.*, 78 Cal. 468.]

⁵ [*Donahue v. Windsor Co. Mut. Fire Ins. Co.*, 56 Vt. 374.]

⁶ [*Schultz v. Merchants' Ins. Co.*, 57 Mo. 331 at 336 (?).]

of performance of a condition, proof of a waiver is admissible without alleging the waiver.¹

§ 590. **Special Allegations ; Interest ; Survivorship ; Value ; Compliance with Statute Requirements ; Negative Allegations.** — The plaintiff must aver an insurable interest, or, if he has not that, the grounds upon which he rests his right to sue.² [The ownership of the property both at the time of insurance and of loss must be shown.³ In a declaration on a policy which on the face of it has no words to show it not to be an interest policy, it is not necessary that the plaintiff should aver an interest in order to recover.⁴ Insurable interest, being an essential fact, must be alleged. Where the loss is payable to a mortgagee “as his interest may appear” the complaint must make his interest appear.⁵ There must be an insurable interest at the time of insurance and at the time of loss, and the plaintiff must show that he is entitled to assert that interest ; but under the Alabama code it is not necessary that the complaint should aver either of these facts.⁶] In *Gilbert v. National Insurance Company*,⁷ it was held that, as the statement in the policy that the insured premises were the property of the plaintiff did not amount to a warranty, the declaration need not aver such ownership.⁸ Where the purchaser or assignee of the “subject insured” is by the terms of the policy entitled to sue, his declaration should show that he has the whole interest. To allege that he has an interest is not sufficient.⁹ An allegation by the plaintiff that “his” store was consumed is a sufficient allegation of ownership after verdict ; and an

¹ *Levy v. Peabody Ins. Co.*, 10 W. Va. 560, and cases cited. [Where the declaration averred that proofs were furnished, and the evidence showed a waiver, it was held an immaterial variance. *Penn Fire Ins. Co. v. Dougherty*, 102 Pa. St. 568.]

² *Freeman v. Fulton Ins. Co.*, 38 Barb. (N. Y.) 247.

³ [*Phoenix Ins. Co. v. Benton*, 87 Ind. 132.]

⁴ [*Nantes v. Thompson*, 2 East, 386 at 394.]

⁵ [*Chrisman v. State Ins. Co.*, 16 Oregon, 283.]

⁶ [*Commercial Fire Ins. Co. v. Cap. City Ins. Co.*, 81 Ala. 320.]

⁷ 12 Irish Law, 143.

⁸ But see *contra*, *Illinois Mut. Fire Ins. Co. v. Marseilles Manufacturing Co.*, 1 Gilm. (Ill.) 236.

⁹ *Granger v. Howard Ins. Co.*, 5 Wend. (N. Y.) 200.

omission to allege the value of the property lost cannot be objected to;¹ otherwise on demurrer.² [The statement that "the assured did sustain loss to the amount of \$231.00 by reason of a fire in above described premises" is not a sufficient averment on a policy of insurance. It should be stated that the loss arose from injury to the goods insured.³] An allegation that the defendant "insured the plaintiff to the amount of three thousand dollars on ten thousand bushels of oats," sufficiently states an insurable interest.⁴ Nor need the description of the property be more specific than that contained in the policy.⁵ [The house burned must be identified with the one insured, and the pleading must show an insurable interest in the assured at the time of fire, and that the premises were occupied if there be a condition against vacancy, but it will be presumed that the house was of some value.⁶] The plaintiff need not allege that the defendants—a foreign insurance company—have complied with the statutes giving them authority to transact business within the jurisdiction.⁷ And in an action by a foreign insurance company, non-compliance will not be presumed, but must be set up in defence.⁸ The plaintiff need not aver the truth of statements contained in the application,⁹ nor the performance or non-performance

¹ *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44; *Insurance Co. v. Seitz*, 4 W. & S. (Pa.) 273; *New Hampshire Mut. Fire Ins. Co. v. Walker*, 10 Fost. (N. H.) 324; *Howard Fire Ins. Co. v. Cornick*, 24 Ill. 455; *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416.

² *Ibid.*; *Fowler v. New York Ind. Ins. Co.*, 26 N. Y. 422, reversing s. c. 23 Barb. (N. Y.) 143. [The value at the time of loss must be alleged. *Phoenix Ins. Co. v. Benton*, 87 Ind. 132. But when the pleader sets out the policy which mentions in detail the articles insured and the several amounts thereon, and then avers an interest to the value of said amounts and total loss, it is not necessary to mention the specific articles lost or their value. *Phoenix Ins. Co. v. Perkey*, 92 Ill. 164 at 168.]

³ *Rodi v. Rutgers Ins. Co.*, 6 Bos. 23 at 24]

⁴ *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520.

⁵ *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315.

⁶ [*Ætna Ins. Co. v. Black*, 80 Ind. 513; *Ætna Ins. Co. v. Kittles*, 81 Ind. 96 (insurable interest).]

⁷ *Fitzsimmons v. City Fire Ins. Co.*, 18 Wis. 234.

⁸ *Williams v. Cheney*, 3 Gray (Mass.), 215.

⁹ *Herron v. Peoria Mar. & Fire Ins. Co.*, 28 Ill. 235; *Germania Fire Ins. Co.*

of conditions subsequent,¹ nor negative prohibited acts,² or allege that he is within the excepted risks.³ [It is not necessary to aver demand of payment before suit brought,⁴ nor to allege that the loss did not occur through fraud or evil practice on the part of the plaintiff.⁵ An omission to state in pleading that the company has power to make contracts of insurance is not demurrable.⁶ When a condition in a policy is void as opposed to statute law it is needless to set it forth in the declaration or mention it in any way, and although the stipulation is set out without referring to the statute, it cannot be claimed that the plaintiff waived the benefit of the law.⁷ The assured is not bound to set forth and prove the truth of his representations.⁸ When to a declaration on a policy of insurance, the defendants pleaded that a condition as to going beyond certain limits (which condition was set forth in the declaration) had been broken, the court refused to allow the plaintiffs in replication to say that at the time of making the policy certain places not mentioned therein were also excepted, to which the plaintiff might go. An equitable replication can never be made where it would put the plaintiff in a better position than if the matter had been set out in the declaration.⁹]

§ 591. Matters in Defence; Breach of Warranty; Misrepresentation; Other Insurance; False Swearing; Fraud. — Matters

v. Curran, 8 Kans. 9; *ante*, § 577; *Piedmont, &c. Ins. Co. v. Ewing*, 92 U. S. 377; *Union Ins. Co. v. McGookey* (Ohio), 8 Ins. L. J. 417.

¹ *Ketchum v. Prot. Ins. Co.*, 1 Allen (N. B.), 136; *Forbes v. Am. Mut. Life Ins. Co.*, 15 Gray (Mass.), 249; *Ætna Ins. Co. v. Phelps*, 27 Ill. 71; *Redman v. Ætna Ins. Co.*, 49 Wis. 431. [Matters of defence, e. g., terms of the policy constituting conditions subsequent, exceptions or prohibitions, need not be set out by the plaintiff. *East Tex. Fire Ins. Co. v. Dyches*, 56 Tex. 565.] *Ante*, § 586.

² *Hunt v. Hudson River Fire Ins. Co.*, 2 Duer (N. Y. Superior Ct.), 481; *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 32.

³ *Lounsbury v. Prot. Ins. Co.*, 8 Conn. 459; *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416.

⁴ [*Excelsior Mut. Aid Ass. v. Riddle*, 91 Ind. 84, 86.]

⁵ [*Bank v. German Amer. Ins. Co.*, 72 Wis. 535.]

⁶ [*Feeney v. People's Fire Ins. Co.*, 2 Rob. 599 at 600.]

⁷ [*Dolbier v. Agricultural Ins. Co.*, 67 Me. 180 at 183.]

⁸ [*Herron v. Peoria Mar. & Fire Ins. Co.*, 28 Ill. 235 at 238.]

⁹ [*Rees v. Scottish, &c. Assn.*, 2 H. & N. 19 at 20.]

in defence cannot be availed of unless pleaded.¹ [If it is intended to show that death resulted from "intentional injuries," within an excepting clause, this defence must be specially pleaded. It cannot be put in under an answer containing merely a general denial. "Stipulations added to a principal contract, which are intended to avoid the defendant's promise by way of defeasance or excuse, must be pleaded in defence."² A corporation when sued cannot plead *nul tiel* corporation unless in case of misnomer or dissolution.³ A condition in a policy that "no holder shall be entitled to maintain any action until he shall have offered to submit to a reference" cannot be set up as a defence unless set forth in the specifications.⁴ When a company is sued, it cannot make any objections to paying losses which are different from or additional to those named by it before suit.⁵ A denial that the plaintiff's loss exceeded \$4000, as claimed by him, is not an admission of any part of his claim.⁶ Irregularities in proceedings caused by the company's wrongfully repudiating its liability will not avail it as a defence.⁷] In setting forth the grounds of defence it is not enough merely to negative the truth of a declaration or performance of a condition in the application made by the insured. The particulars in which the untruthfulness or breach consists should be set out as far as can reasonably be done, that the plaintiff may have some notice of what he is to meet. Thus, where the plaintiff in his application stated that he had not had symptoms of gout, "or any other complaint," the plea that he had had symptoms

¹ *Haskins v. Hamilton Mut. Ins. Co.*, 5 Gray (Mass.), 432; *New York Central Ins. Co. v. Nat. Prot. Ins. Co.*, 20 Barb. (N. Y.) 468; *Sussex County Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541; *Cassacia v. Phoenix Ins. Co.*, 28 Cal. 628; *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656; *Mulrey v. Mohawk Ins. Co.*, 5 Gray (Mass.), 541. So far as *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9, is to the contrary, it is *obiter*.

² [*Coburn v. Travelers' Ins. Co.*, 145 Mass. 226, 229.]

³ [*McCullough v. Talladega Ins. Co.*, 46 Ala. 376 at 377.]

⁴ [*Dyer v. Piscataqua Fire & Mar. Ins. Co.*, 53 Me. 118 at 119.]

⁵ [*Castner v. Farmers' Mut. Fire Ins. Co.*, 50 Mich. 273; *Richards v. Washington Fire & Mar. Ins. Co.*, 60 Mich. 420.]

⁶ [*Hiles v. Hanover Fire Ins. Co.*, 65 Wis. 585.]

⁷ [*Shiells v. Scottish Ass. Corp.*, 26 Scot. L. R. 702.]

of disease of the stomach was held insufficient, as too vague; and it was said that while the court would not tie the defendant down very strictly at the trial, he must honestly do his best to furnish particulars. The particular symptoms should be stated.¹ So where misrepresentation of title or breach of warranty is alleged, facts from which the court can see that there is misrepresentation or breach of warranty must be stated.² So a plea of a defective fireplace should show in what the defect consisted, and that it was material to the risk.³ And a plea that the roof is defective does not open the question of defects in other parts of the building.⁴ A plea of other insurance should state the particulars.⁵ If fraud is alleged in defence, it should show that the fraud was committed by the plaintiff or some party in interest,⁶ and in what particulars.⁷ [Wilful and intentional fraud in regard to a material matter will avoid the contract.⁸ A policy obtained through fraud is void both in law and equity.⁹ But evidence of fraud in an action on a policy can only be admitted if specially pleaded.¹⁰ If the assured fraudulently claims more than is due him, he can recover nothing.¹¹ When the company pleaded that they had reason to suspect the loss claimed to be fraudulent, and that the goods claimed to be destroyed were not, all letters appertaining to the motive of the insured and the possession of the goods at the time of loss are admissible.¹² When a person is induced by fraud to accept a policy containing a certain

¹ *Marshall v. Emperor Life Ass. Co.*, Law Reports (1 Q. B. Cas.), 35.

² *Ken. & Lou. Mut. Ins. Co. v. Southard*, 8 B. Mon. (Ky.) 634; *Merch. & Manuf. Mut. Ins. Co. v. Wash. Mut. Ins. Co.*, 1 Handy (Ohio), 408; *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315.

³ *Ibid.*

⁴ *Newman v. Springfield Fire & Mar. Ins. Co.*, 17 Minn. 123.

⁵ *Ramsay Woollen Cloth Manufacturing Co. v. Mutual Fire Ins. Co.*, 11 U. C. (Q. B.) 516.

⁶ *Ferriss v. North American Fire Ins. Co.*, 1 Hill (N. Y.), 71.

⁷ *Ibid.*; *Sterling v. Mercantile Mut. Ins. Co.*, 32 Pa. St. 75.

⁸ [*Insurance Co. v. Hughes*, 10 Lea (Tenn.), 461.]

⁹ [*Wittingham v. Thornborough*, 2 Vern. 206.]

¹⁰ [*Flynn v. Merch. Mut. Ins. Co.*, 17 La. Ann. 135 at 136.]

¹¹ [*Britton v. Royal Ins. Co.*, 4 F. & F. 905 at 909; *Huchberger v. Merchants' Ins. Co.*, 4 Biss. 265 at 266.]

¹² [*Brugnot v. La. St. Mar. & Fire Ins. Co.*, 12 La. 326 at 331.]

condition whose breach shall invalidate it, he cannot after such a breach sue on the contract, on the failure of the company to pay the proceeds to him.¹ A conspiracy to get insurance on fictitious property will of course if shown avoid the policy.² An allegation of fraud in inducing the insured to surrender his policy cannot be sustained where he had full opportunity to ascertain the facts.³ A company's refusal to insure does not make it fraud to take a policy from its agent a few weeks later.⁴ Parol evidence is competent to show fraud on the agent's part, inducing the plaintiff to insure, and keeping him in ignorance of the conditions of the policy.⁵ One who in fraud buys the assignment of an insurance policy knowing it to be a speculative contract cannot, after failing to make the company pay, come into court to recover the consideration he paid the fraudulent assignor.⁶ It makes no difference whether one states that which he knows to be false or asserts as truth that of which he has no knowledge.⁷ Fraudulent representations of an agent as to his abilities and work in previous companies is a good defence to an action by him for his salary.⁸ But where the company had examined the books of the agent showing his past work, the jury is at liberty to infer that the company did not act on the agent's representations, but on the examination.]

A plea of false swearing relates to the preliminary proof, and must show where, and before whom, the oath was taken, and in what particulars it is false.⁹ [Proof of false swearing may be given under a plea of *nil debet* in an action of debt on a policy.¹⁰ False swearing must be proved affirmatively, and the proofs of loss may be a part of such evidence.¹¹ The plaintiff may testify

¹ [Tebbetts v. Hamilton Mut. Fire Ins. Co., 3 Allen (Mass.), 569 at 569.]

² [Phoenix Ins. Co. v. Moog, 78 Ala. 284.]

³ [Hencken v. U. S. Life Ins. Co., 11 Daly, 282.]

⁴ [Body v. Hartford Fire Ins. Co., 63 Wis. 157.]

⁵ [McKenzie v. Planter's Ins. Co., 9 Heisk. 261 at 267.]

⁶ [Blattenberger v. Holman, 103 Pa. St. 555, 558 (1883).]

⁷ [Evans v. Edmonds, 13 C. B. 777 at 785.]

⁸ [Barker v. Knickerbocker Life Ins. Co., 24 Wis. 630.]

⁹ Ketchum v. Prot. Ins. Co., 1 Allen (N. B.), 136; Clay Fire, &c. Ins. Co. v. Wusterhausen, 75 Ill. 285.

¹⁰ [Phoenix Ins. Co. v. Munday, 5 Cold. 547 at 554.]

¹¹ [Phoenix Ins. Co. v. Munday, 5 Cold. (Tenn.) 547 at 552.]

as to how much he thinks his loss may be, and the fact that it is proved to be one-half less is not presumptive evidence of false swearing.¹ A claim that property lost is the assured's when in fact it belonged to other members of the family, if made *bona fide*, is not "false swearing."² The fraud or false swearing pleaded to defeat a policy must be alleged to be material and wilful.³

[§ 591 A. *Ultra Vires*.⁴ — A company is not estopped from setting up the plea of *ultra vires* because its agent made the insured believe that it was within the company's power.⁵ If the law prohibits town insurance companies from insuring school-houses without a majority vote of the members, a policy without such vote is void, and a policy issued on a dwelling-house becomes void if it is turned into a school-house and no such vote is obtained.⁶ When a company is authorized to insure where the member has a fee simple or a less estate *specified in the policy*, a violation of this provision by issuing a policy to a husband on his wife's realty, stated to be his in fee, makes the policy *ultra vires* and void in its inception, and no assignment or waiver can render it valid.⁷ The "Hull and London Fire Insurance Company" had general authority to transact marine insurance, but the charter provided that in every policy the funds of the company alone should be liable. They started a marine branch and had their policies headed "H. & L. Marine Co.," but there was no stipulation in them that the funds of the company alone should be liable, and therefore even *bona fide* ship insurers could not recover on their policies because they were *ultra vires* the charter.⁸ But a company which knowingly issues a policy to one under the age required by its by-laws

¹ [Unger v. People's Fire Ins. Co., 4 Daly, 96 at 98.]

² [Farmers' Mut. Fire Ins. Co. v. Gargett, 42 Mich. 289 at 293.]

³ [Steeves v. Sovereign Fire Ins. Co., 20 U. B. R. 394; Insurance Co. v. Starr, 71 Tex. 733.]

⁴ [See § 577, & ch. 4.]

⁵ [Webster v. Buffalo Ins. Co., 7 Fed. Rep. 399; 2 McCrary, 348 (Mo.), 1881.]

⁶ [Luthe v. Farmers' Mut. Fire Ins. Co., 55 Wis. 543.]

⁷ [Froehly v. North St. Life Ins. Co., 32 Mo. App. 302.]

⁸ [Hambro v. Hull, &c. Ins. Co., 3 H. & N. 789.]

cannot avail itself of such defence.¹ When a charter of an insurance company gives the power of insuring to the directors, and provides that they divide all risks into four classes and assign each policy to its proper class; and where a by-law defined the kind of property to be assigned to each class; and when with a full knowledge of the facts the directors insured *A* in the third class when he properly belonged in the fourth, — it was held that though the act was irregular on the director's part, yet the policy was not void.² Defects which make a contract *ultra vires* cannot be waived by the officers of the company.³ But a member sued for an assessment cannot set up the invalidity of the charter of the company, or the *ultra vires* character of his contract.⁴

[§ 591 B. **New Trial.** — If the company discover new evidence enabling them to prove that the insured died from *delirium tremens*, they may maintain a bill in equity to set aside the judgment and obtain a new trial.⁵ Where the insured endeavored to prove a waiver by showing against objection that they had sent to the company a registered letter for a premium instalment falling due after the loss, and on motion for a new trial it appeared that the company had promptly returned the letter, but that this fact was unknown to the company's attorney at the trial, it was held that a new trial should have been granted.⁶]

§ 592. **Bankruptcy and Insolvency; Conflict of Laws.** — An insurance company is a "business or commercial corporation" within the meaning of the bankrupt laws of the United States, and if it commits acts of bankruptcy, may be declared bankrupt like a natural person.⁷ This case gave rise to an interesting question of jurisdiction. After the act of bankruptcy, the company was declared insolvent under the

¹ [Gray v. National Ben. Ass., 111 Ind. 531.]

² [Union Mut. Fire Ins. Co. v. Keyser, 32 N. H. 313 at 316.]

³ [Froehly v. North St. Life Ins. Co., 32 Mo. App. 302, 312.]

⁴ [Freeland v. Pa. Cent. Ins. Co., 94 Pa. St. 504.]

⁵ [Trefz v. Knickerbocker Life Ins. Co., 10 Ins. L. J. 590 (N. J.), 1881.]

⁶ [Continental Ins. Co. v. Hillmer, 18 Ins. L. J. 691 (Kans.), Jan. 5, 1889.]

⁷ Reed v. Independent Ins. Co., Cir. Ct. U. S. Mass. Dist., 1872, Shepley, J., 1 Ins. L. J. 735; Knickerbocker Ins. Co. v. Comstock, 16 Wall. (U. S.) 258.

insolvent laws of Massachusetts, under proceedings in the courts of that State, enjoined from further doing business, and at a subsequent date a receiver was appointed, and the corporation itself adjudged and decreed to be dissolved. On a petition in bankruptcy subsequently, it was claimed that the corporation was defunct, and could not answer or be dealt with. But the court held that the insolvent laws of Massachusetts were suspended, after the passage of the bankrupt law, as to all matters to which the latter applied, and therefore the proceedings in insolvency in the courts of Massachusetts were ineffectual and nugatory; and that irrespective of those statutes, or of some other statute authority, the courts of Massachusetts had no more right to annul the existence of the corporation than they would have to take the life of a natural person.¹ A mutual life insurance company was also held to be a "business" corporation within the meaning of that act in the United States District Court for the Southern District of New York.² [An assignment to a receiver by order of the court of the domicile of the company passes promissory notes of debtors residing in other States, and takes priority over an attachment subsequently levied by creditors in the State of the debtors.³]

§ 593. **Bankruptcy ; Status of the Company.** — After adjudication of bankruptcy the court has exclusive jurisdiction over the estate and assets of the bankrupt corporation, and is vested with all the power and control previously vested in either the chartered officers of the company or stockholders, or both collectively, over the same, and can make any assessment or call necessary for the collection of the assets as fully as the stockholders or directors could have done. And if the notes given by the stockholders, as and for the capital stock, have not been paid, any balance remaining unpaid

¹ The learned judge cited, amongst other cases, *Folger v. Columbian Ins. Co.*, 99 Mass. 267; *Hayward v. Fulcher*, Sir William Jones (folio), 166; *Dean and Chapter of Norwich*, Coke, part 3, 75 a. The real question, however, in this case was whether the insurance company was within the meaning of the Bankrupt Act of 1867.

² *In re Hercules Mut. Life Ass. Soc.*, 1 Ins. L. J. 875.

³ [*Taylor v. Life Ass. of Amer.*, 13 Fed. Rep. 493 (Tenn.), 1882.]

may be called in by order of court, notwithstanding, by the terms of the subscription and by the certificate of stock, that balance is to be paid on the call of the directors when ordered by the stockholders. And such call is conclusive as to its amount and propriety, and cannot be questioned in a collateral suit, or in a suit on the note. Nor can the defence of false representation as to the character and prospects of the company be set up as against the assignees who represent the creditors, though that might have been good had it been availed of before the adjudication. Nor can it avail that the directors voted to release the stockholders from the payment of any outstanding balance due on their stock notes, and caused them to be stamped unassessable. Such a vote is inoperative as to creditors and those who insured in the company without knowledge of the fact. And the purchaser of a certificate, who surrenders it and has one issued to himself, succeeds to the rights and the liabilities of the holder of the certificate which he purchased, and of an original stockholder, and the acceptance of a partly unpaid certificate carries with it an implied obligation to pay the balance. In making the call for an assessment it is discretionary with the court whether to give notice, and the stockholders are so far parties to the bankrupt proceedings as to be bound thereby without notice.¹ But an insolvent company cannot compel the payment of continued premiums for a protection which it cannot give;² and a renewal premium forwarded to the agent but not paid over to the company may be recovered from the agent.³

§ 594. **Bankruptcy and Insolvency; Powers and Duties of Assignee and Receivers; Status of Policy-holder.** — The bankruptcy of an insurance company does not necessarily release the policy-holder from the obligations of his contract; and whatever remains incomplete at the time of the adjudication of bankruptcy passes over to be acted upon by the

¹ Upton v. Hansbrough, U. S. Dist. Ct., North Dist. Ill., January Term, 1873, 5 Chicago Legal News, 242. An elaborate and well-considered case.

² Farmers', &c. Ins. Co. v. Smith, 53 Ill. 187.

³ Smith v. Binder, 75 Ill. 492.

court which represents the company and succeeds generally to its rights. The member of a mutual insurance company may still be liable to assessments on his premium notes, and the member of a stock company to assessments on his stock. The assignee has not the original powers of the company. He is an officer of the court and a trustee of the creditors, and cannot waive the performance of conditions, whether limiting time within which action may be brought or otherwise, which the company might have done. And it is his duty, where proofs have been furnished and losses adjusted before adjudication, to revise the same, if he has reason to believe there is any equitable ground for such revision, and he may affirm what appears clearly to have been done or accepted by the company in the way of adjustment or proof of loss. But if that which has been done would not have concluded the company, he can give it no additional force by his affirmance.¹ Nor can the corporation or receiver pay losses arising after injunction and sequestration.² Several of the States have passed special statutes relative to the insolvency of insurance companies, differing in particulars, but substantially alike. In New York, the receiver, who is an officer of the court placed in charge of the property, may sue in his own name. In Massachusetts, the corporation is not dissolved merely by the insolvency proceedings, and the receiver sues in the name of the company. In New York, — and the same is doubtless true of other States, — the receiver takes the place of the directors in the settlement of the affairs of the company, under the direction of the court, and all his acts must have the sanction of the court. Both he and the creditors are under the jurisdiction and control of the court.³

¹ *In re Fireman's Ins. Co.*, U. S. Dist. Ct., North Dist. Ill., January, 1873, 5 Chicago Legal News, 253; *Upton v. Jackson* (C. Ct. Mich.), 4 Ins. L. J. 189. See also *Com. v. Mass. Mut. Ins. Co.*, 112 Mass. 116; *Com. v. Dorchester Mut. Ins. Co.*, 112 Mass. 142; s. c. 3 Ins. L. J. 1; *Michenor v. Payson*, C. Ct. (Pa.), 5 id. 116; *Upton v. Tribilcock*, 91 U. S. 45; s. c. 5 Ins. L. J. 96; *Sanger v. Upton*, C. Ct. (Ill.), 6 id. 618; *Atty.-Gen. v. N. A. Ins. Co.* (N. Y.), 9 id. 849; *Upton v. Englehart*, C. Ct. (Iowa), 3 id. 743; *Hone v. Allen*, 1 Sandf. (N. Y.) 171, n.; s. c. and others, 2 Ben. Fire Ins. Cas. 597 *et seq.*

² *Commonwealth v. Mass. Mut. Ins. Co.*, *ubi supra*.

³ *Rinn v. Astor Fire Ins. Co.*, 59 N. Y. 143.

In making assessments, however, he must show the existence of the same facts and circumstances which would authorize an assessment by the directors if the company were not insolvent. He derives no additional powers from the fact of insolvency, and can maintain suits and recover thereon as and only as the directors might have done.¹ Although, in general, he has no greater power than the directors had, yet he may call in the unpaid stock for the benefit of creditors, to pay all debts and legal liabilities, if necessary, even though the company, had it not been thrown into bankruptcy, might have been able under its charter to collect only so much as might be necessary to pay "losses" proper, as distinguished from liabilities.² Nor, when bankruptcy proceedings have commenced, can creditors, in equity or at law, enforce their claims against the stockholders individually. Their remedy, whether for the payment of their claims or against unjust assessments, is in the bankruptcy court, where the estate of the company is, and where all questions between the respective parties in interest are to be determined.³ Being an officer of court, he is not suable at law in any process, judgment wherein would effect the custody of the property. The receiver's possession is the possession of the court, and any disturbance of that possession would be a contempt of its authority.⁴ As we have just seen that in bankruptcy the

¹ *Savage v. Medbury*, 19 N. Y. 32; *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656; *Thomas v. Whallon*, 31 id. 172; *Shaughnessy v. Rensselaer Ins. Co.*, 21 id. 605; *Sands v. Hill*, 42 id. 651; *Furniss v. Sherwood*, 3 Sandf. (N. Y. Superior Ct.) 521; *Brouwer v. Hill*, 1 Sandf. (N. Y. Superior Ct.) 629; *In re Globe Ins. Co.*, 6 Paige (N. Y.), Ch. 102.

² *Payson, Ass., v. Stoeve* (U. S. C. Ct., Dist. of Minn.), 2 Ins. L. J. 733; *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 380.

³ *Payson, Ass., v. Stoeve*, *ubi supra*. In this case, it was held that a stockholder, who had ignorantly subscribed to stock which was illegally issued, but was afterwards legalized by legislative enactment, was held to be liable to assessment thereon, it appearing that he received dividends, and that at a regular annual meeting of the stockholders, at which he might have been present, it was voted further to increase the capital stock, although he had in fact no previous knowledge of the illegality, nor of the legislative action thereto, prior to the suit brought to enforce the claim against him. And see also *Payson v. Withers*, U. S. C. Ct., Dist. of Ind., 2 Ins. L. J. 599; s. c. 5 *Chicago Legal News*, 445.

⁴ *Spinning v. Ohio Life, &c. Co.*, 2 Dist. Sup. Ct. Cincinnati, 336.

assignees have not the full discretionary powers of the directors, so in insolvency the receiver, being a trustee, has no right to waive proofs of loss, and, upon the same grounds, doubtless no right to waive the Statute of Limitations, or other legal defence.¹ An assignment by the act of the parties clothes the assignee with no powers not rightfully given by the deed of assignment; and this does not include the power to make assessments, and the like powers held by the corporation. Such powers are not transferable.² [The only interest in a life policy that passes to the assignee of a bankrupt is the surrender value of the policy at the time of the bankruptcy.³ The right of an insolvent debtor in a life policy payable if he survives, at a day certain after the day of publication of notice, passes to the assignee in insolvency.⁴ If a policy for five years is issued on payment of the first year's premium and a note payable in yearly instalments for the rest, and the company fails in a few months, the note cannot be enforced, for the consideration of it fails.⁵ The receiver of an insolvent company who continues to use the premises formerly occupied by the company is liable for the rent.⁶]

§ 594 *a*. **Insolvency; Distribution of Assets; Priority of Claims.** — [The receiver is entitled to compensation for labor and expenses, and the rest of the assets go to the creditors.⁷]

¹ *Evans v. Trimountain Mut. Fire Ins. Co.*, 9 Allen (Mass.), 329; *In re Fireman's Ins. Co.*, *ubi supra*; *McEvers v. Lawrence, Hoffman* (N. Y.), Ch. 172.

² *Hurlbut v. Carter*, 21 Barb. (N. Y.) 221.

³ [*In re McKinney*, 15 Fed. Rep. 535 (N. Y.), 1883.]

⁴ [*Bassett v. Parsons*, 140 Mass. 169.]

⁵ [*Home Ins. Co. v. Daubenspeck*, 115 Ind. 306.]

⁶ [*People v. Universal Life Ins. Co.*, 30 Hun, 142.]

⁷ [On the question of compensation of receivers of insolvent life insurance companies, see act of 1869, c. 902, § 13; *Attorney-General v. North Am. Life Ins. Co.*, 89 N. Y. 94; *People v. McCall*, 94 N. Y. 587; *Attorney-General v. North Am. Life Ins. Co.*, 26 Hun, 294; *In re Security Life Ins. & Annuity Co.*, 31 Hun, 36; *People v. Knickerbocker Life Ins. Co.*, 31 Hun, 622; *Attorney-General v. Continental Life Ins. Co.*, 32 Hun, 223; *In re Commonwealth Ins. Co.*, 32 Hun, 79; *Attorney-General v. Guardian Life Ins. Co.*, 93 N. Y. 631. A referee appointed to take proofs and report upon the claims of a receiver for compensation and expenses, may himself be compensated out of the company's funds, in the discretion of the court. *Attorney-General v. Continental Life Ins. Co.*, 93 N. Y. 45. Policy-holders intervening to reduce the compensation claimed by the re-

The creditors of an insolvent company all stand alike, each without priority of claim over the other, without reference to the date when the claims accrue, unless before the insolvency there is a lien on or a specific appropriation of funds for the payment of a particular claim.¹ Unless there is such an appropriation to pay a declared dividend, stockholders must forego it, and go in with the general creditors.² The policy-holders in an insolvent stock company are not partners, but creditors, with claims for damages for a breach of their several contracts. These damages are the net value of the policies, without regard to the health of the holders, less outstanding premium notes. And it was also held, in the same case, that unmatured paid-up policies should fare no better than the others; that death claims maturing prior to the insolvency were entitled to no preference; and that losses

ceiver of an insolvent company cannot be allowed expenses and counsel fees out of the assets. *Attorney-General v. North Am. Life Ins. Co.*, 91 N. Y. 57. But when an insurance company is served with an order to show cause why a receiver should not be appointed, if the officers have reasonable grounds to believe the company solvent, it is their duty to oppose such order, and reasonable expenses incurred are to be allowed them in the discretion of the court, but services of an attorney to the company after the appointment of a receiver constitute no legal claim against the receiver or the funds in his hands. *Barnes v. Newcomb*, 89 N. Y. 108. Creditors of an insolvent company intervening in proceedings instituted by the receiver, cannot have their counsel fees out of the assets. *Attorney-General v. Continental Life Ins. Co.*, 27 Hun, 195.]

¹ [A lien or priority among policy-holders can only arise by statute by-law, or contract. *Taylor v. Life Ass. of Am.*, 13 Fed. Rep. 493 (Tenn.), 1882. Claimants of unearned premiums and surrender values stand on an equality with general creditors. *Carr v. Union Mut. Fire Ins. Co.*, 33 Mo. App. 291. Claims founded on losses occurring before dissolution have no priority above policies running at that time. *Relfe v. Columbia Life Ins. Co.*, 76 Mo. 594. Funds arising on a general contract of re-insurance are to be distributed among all the creditors of the re-insured company if it is insolvent. A particular contract of re-insurance may be made for the indemnity of the individuals whose risks are re-insured, but if the agreement is general, all the creditors come in for a share of the proceeds. *Goodrich's Appeal*, 109 Pa. St. 523. The assets of a mutual company are a trust fund to pay mortuary benefits, and where there is such a purpose to which they may be applied, the directors cannot apply them to cover advances made by themselves upon a prior death-claim for which they might have made an assessment. As to such advances they come in as ordinary creditors. *Wilber v. Forgeson*, 24 Brad. 119.]

² *Lowene v. Am. Fire Ins. Co.*, 6 Paige (N. Y.), Ch. 482; *DePeyster v. Am. Fire Ins. Co.*, id. 486.

happening prior to the expiration of the time for the presentation of claims were entitled to be treated as matured.¹ [Policy-holders are entitled to claim the surrender value of their policies calculated according to the American Tables of Mortality, of which the courts will take judicial notice.² Where old policies have been surrendered and new ones taken in their places, if the company becomes insolvent, the holders are to be allowed the value of the new, not of the old policies.³ Where a company becomes insolvent and during the proceedings before the report of the actuary is confirmed a person insured dies, the beneficiary is entitled to have the policy valued, not as a continuing insurance, but on the basis of death.⁴ But where the death does not occur until after the valuation is complete and confirmed by the court, the policy will not be revalued.⁵ Where after expiration of the time for presentation of claims against an insolvent company a policy-holder whose claim has been presented and allowed, dies, the court may direct a revaluation of the policy.⁶ The contingent interests of children to whom an endowment policy is payable if the insured die before the endowment period is out, become fixed by intervening insolvency of the company, and are to be calculated by the ordinary tables.⁷]

In a purely mutual company, however, claims founded on policies matured before insolvency are to be preferred to claims on policies not matured. The termination of the risk changes the status of the holder of the policy. Prior to the change he was entitled, as between himself and the other members, to his share of the revenue fund. After the change the claim becomes a debt due from the company to a stranger.

¹ *People v. Security, &c. Ass. Co.*, 78 N. Y. 114; *Guy v. Globe Ins. Co.* (Circuit Ct. Richmond, Va.), 9 Ins. L. J. 467. See also *Holdich's Case*, L. R. 14 Eq. 72; s. c. 3 Big. Life & Acc. Ins. Cas. 272, citing and commenting upon *Lancaster's* (3 Big. Life & Acc. Ins. Cas. 272) and *Bell's* (L. R. 9 Eq. 706) cases.

² [*McDonnell v. Ala. Gold Life Ins. Co.*, 85 Ala. 401.]

³ [*Attorney-General v. Continental Life Ins. Co.*, 91 N. Y. 647.]

⁴ [*People v. Knickerbocker Life Ins. Co.*, 34 Hun, 476.]

⁵ [*People v. Knickerbocker Life Ins. Co.*, 38 Hun, 601.]

⁶ [*Attorney-General v. Continental Life Ins. Co.*, 88 N. Y. 77.]

⁷ [*Carr v. Hamilton*, 129 U. S. 252.]

He stands towards the company as an outside creditor of a firm stands to the firm, — to be preferred before a member of the firm.¹

Where a dividend has been declared out of a clear surplus, and the checks therefor made out and signed, after notice of time and place of payment, this is an equitable appropriation of the funds to the stockholders; and as against the receiver and creditors they will be entitled to the funds so appropriated, though insolvency intervene before the actual delivery of the checks.²

If there is no privity of contract between a reinsurer and the original insured, the latter, in case of the insolvency of his insurer, has no better claim upon the money paid by the insurer than the other creditors. Whatever may be paid by the reinsurer on his contract with the reinsured becomes a common fund, for the benefit of all the creditors.³

In Alabama, foreign insurance companies are required to make certain deposits with the State treasurer, for "the protection of the policy-holders" in that State. The appellants, unable to pay their losses, made a general assignment, and gave notice to policy-holders to return their policies for cancellation, when they would receive certificates for unearned premiums, which they could present to the assignee for settlement. The defendant, a resident agent of the company, without any special authority from the company, cancelled all the policies issued by him, reinsuring some, and paying out of his own pocket the unearned premiums to others, with the understanding that he should be reimbursed out of the proceeds of the deposited security. He then brought his bill in equity to subject the deposited bonds to the reimbursement of these claims, and also to recover a balance of his personal account. It was held that, though the agent could not cancel

¹ *Mayer v. Attorney-General* (N. J.), 9 Ins. L. J. 671, referring to and distinguishing the case of the Security Company, *supra*. See also *Commonwealth v. Mass. Mut. Ins. Co.*, *supra*; *Vanatta v. N. J. Mut. Life Ins. Co.*, 31 N. J. (Eq.) 15, Runyon, Chancellor.

² *Le Roy v. Globe Ins. Co.*, 2 Edw. (N. Y.) Ch. 657.

³ *Herckenrath v. Am. Mut. Ins. Co.*, 3 Barb. (N. Y.) Ch. 63; *Carrington v. Com. Fire & Mar. Ins. Co.*, 1 Bosw. (N. Y.) 152.

the policies by virtue of his general authority to act for the interest of the company, yet the transaction between him and the policy-holders subrogated him to their rights against the deposit, as to the claims of the policy-holders transferred to him, but not as to his personal account.¹

§ 595. **Bankruptcy and Insolvency; Set-off.** — In general, a set-off of a liquidated debt due the corporation is allowable against an unliquidated debt due from them; and this extends to all mutual credits arising *ex contractu* between the original parties.² When an insurance company becomes insolvent, the court will sustain the claim of holders of a policy under which they are entitled to recover for a loss, to have a note given by them prior to the insolvency, and purchased by the insurance company, applied in part payment of the loss, although the note has been sold, if the sale be subsequent to the insolvency and to the happening of the loss.³ So where the insurance company had loaned money directly to the assured, who afterwards sustained a loss, it was held that the loan might be set off in the adjustment of the claim for the loss.⁴ If, however, the assured has before the loss assigned his policy with the assent of the insurer, and after the loss surrenders the policy and takes a negotiable certificate of the amount of the loss, which is indorsed to the assignee of the policy in lieu thereof, the original insured

¹ United States Fire & Mar. Ins. Co. v. Tardy (Ala.), 2 Ins. L. J. 673.

² Holbrook v. American Fire Ins. Co., 6 Paige (N. Y.), Ch. 220.

³ Commonwealth v. Shoe & Leather Dealers' Ins. Co., 112 Mass. 131. In Straus v. Eagle Insurance Company, 5 Ohio St. 59, it was held that insurers having no right to invest their money in promissory notes could not set off the notes of a policy-holder against his claim for a loss. But in Hovey v. Home Insurance Company, C. Ct. (Ohio), 3 Ins. L. J. 815, the court, after a careful review of the cases, were evidently not satisfied with this doctrine, and held that reinsurers, on the insolvency of the reinsured company, might set off at their face value policies which they had bought at a discount against the claims of the assignee of the insolvent company for loss.

⁴ Receivers of Globe Ins. Co., 2 Edw. (N. Y.) Ch. 625; Osgood v. De Groot, 36 N. Y. 348. [When the holder of a life policy borrows money from the insurer it will be *prima facie* presumed that he does so on faith of the insurance, which possibly may meet his obligation, and if the company becomes insolvent the debt would be set off against the amount due on the policy. Carr v. Hamilton, 129 U. S. 252.]

cannot set off the amount due for such loss against a debt due from him to the insurer; but he must pay such debt in full, and take a dividend on his loss, if the company is insolvent.¹ In *Drake v. Rollo, Assignee*,² it was held that where a person borrowed money of an insurance company, payable partly in three and partly in five years, and before the payment the company became insolvent and was adjudicated a bankrupt, he can, under the twentieth section of the bankrupt law, providing that mutual debts and credits may be set off, set off the debt for claims he has for loss on policies against the company, though the effect would be to give him a preference over other creditors. The rights of the parties are to be determined by the state of facts at the time of the loss. And if in such case the money borrowed is not due when the loss becomes payable, and the company is bankrupt and insolvent, the borrower may maintain his bill in equity against the company or its assignee to enforce the set-off. If, however, the claim against the company for loss be procured with full knowledge of their insolvency, though prior to any legal declaration of the fact, it cannot be set off, as this would be a perversion of the statute for the benefit of one creditor to the prejudice of another, and against its spirit. If a court of equity could not interpose in such a case, though it be not one of the claims excepted from the right of set-off, a person might borrow the whole capital of an insurance company, and on learning of its insolvency, instead of paying the debt, might use a part of it in buying up the depreciated claims against the company to the amount of his debt, and keep the rest in his pocket.³ [When the policy insured *A.* "for whom it might concern," an indorsement thereon showing that *A.*, *B.*, and *C.* were the assured, it was held that all might join in an action, and that the company could not set off against *B.* and *C.* a debt due them from *A.*⁴]

¹ *Swords v. Blake*, 3 Edw. (N. Y.) Ch. 112.

² U. S. C. Ct., North. Dist. Ill., 6 Chicago Legal News, 9.

³ *Hitchcock v. Rollo, Ass.*, id., disapproving *In re The City Bank of Gurney*, 4 Legal News, 81 U. S. Dist. Ct. Cal.; *Smith v. Hill*, 8 Gray (Mass.), 572.

⁴ [*Williams v. Ocean Ins. Co.*, 2 Met. 303 at 306-307.]

§ 596. **Rule as to Set-off when Company is solvent different from the Rule when Company is insolvent.** — The right of set-off is affected by the question whether the company is solvent or insolvent. Thus, where the insured still owes an unpaid balance of his subscription or stock note, this balance is a fund in trust for the benefit of creditors, and a claim for loss cannot be set off against it so long as the losses are unpaid in full. In a solvent company, able to pay all its losses, the claims might be deemed mutual, and subject to set-off, each against the other. But insolvency changes the rule.¹ Nor are holders of claims for losses entitled in mutual insurance companies to set off their claims in actions on their premium notes. They must pay those notes to the amount required, and then, if the assets prove insufficient to pay the whole amount of the losses, they can only receive the same percentage of their losses that the other members receive; otherwise, the holder of a claim offsetting the whole or a portion of it against the company's claim on his premium note would receive more than his just proportion of loss.² Nor can a claim for loss assigned to the maker of a premium note be set off in an action on the premium note, except to the amount to which he would be entitled as a dividend on the claim.³ In payment of losses, the insurers are entitled to set off all sums due on the premium note, and for the claimant's just proportion of losses up to the time of payment of the loss; or, if the company is trustee, up to the time of the service of process.⁴ [When a company goes into insolvency the amount due on an endowment policy should be set off against a mortgage debt due the company from the holder of the policy.⁵ But one who is indebted to an insol-

¹ *Scammon v. Kimball*, 5 Biss. (U. S. C. Ct.) 431; *Jenkins v. Armour* (U. S. C. Ct.), 14 N. B. R. 276; *Sawyer v. Hoag*, 17 Wall. (U. S.) 610.

² *Lawrence v. Nelson*, 4 Bosw. (N. Y. Superior Ct.) 240; s. c. affirmed, 21 N. Y. 158; *Hillier v. Alleghany County Mut. Ins. Co.*, 3 Barr (Pa.), 470. And see also *Lawrence v. McCready*, 6 Bosw. (N. Y.) 329.

³ *Long v. Penn Ins. Co.*, 6 Pa. St. 421.

⁴ *Swamscot Mach. Co. v. Partridge*, 5 Fost. (N. H.) 369; *Nevins v. Rockingham Fire Ins. Co.*, id. 22.

⁵ [*Carr v. Hamilton*, 129 U. S. 252.]

vent company cannot set off the reserve value of an endowment policy held by him, payable to his wife in case of his death before a time named or to him if then living.^{1]}

[§ 597. **Cessation of Business; Selling out to Another Company.** — Where a life company has practically ceased to do business, equity will entertain a bill by the policy-holders to enforce the termination of their contracts, and the payment of their present value.² Unless prevented by an express contract an insurance company may transfer its funds to another company who take all liabilities.³ And payment of premiums to the new company releases the old one on the policy.⁴ Where the receiver of an insolvent company (N.) enters into a contract with the C. Company by which C. agrees to assume the liabilities of N., and some of N.'s policy-holders surrendered them to C., receiving its policies in exchange, it was held that C. did not by such surrender become a policy-holder in the N. Company, and could not claim a share in the distribution of its funds. Policy-holders in N. who paid premiums to C. but did not surrender their policies were held entitled to a share in the assets of N.^{5]}

¹ [Newcomb v. Almy, 96 N. Y. 308.]

² [Ingersoll v. Mo. Val. Life Ins. Co., 37 Fed. Rep. 530 (Kans.), 1889.]

³ [King v. Acc. Life Fund, &c., 3 C. B. N. s. 151 at 162.]

⁴ [Re Nat. Prot. Life Ass. Soc., 9 Law Rep. Eq. Cas. 306 at 315; Re Internat. Life Ass. Soc. & Hercules Soc., 9 Law Rep. Eq. Cas. 316 at 324; Re Times Life Ass. & Guarantee Soc., 9 Law Rep. Ch. Ap. 381 at 396.]

⁵ [Reese v. Smyth, 95 N. Y. 645.]

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Author		Vol.
May, John Wilder		1
Title	The law of insurance, as applied to fire, life, accident...	Copy

